EDITOR'S NOTE

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No. 91-404

In The

Supreme Court of the United States

October Term, 1991

AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J J & T, INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO,

Petitioners,

v.

GENERAL MOTORS CORP., FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, FAIRFAX GROUP LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- AND APPENDIX -

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QUESTIONS PRESENTED

I.

WHETHER *NOERR-PENNINGTON* OR FIRST AMENDMENT IMMUNITY PROTECTS A PRIVATE ACTOR, JOINTLY ENGAGED IN STATE ACTION UNDER COLOR OF LAW WITH STATE OFFICIALS, FROM LIABILITY UNDER 42 U.S.C. § 1983.

II.

WHETHER A FEDERAL COURT MAY INTERPRET MICHIGAN STATE LAW OF COLLATERAL ESTOPPEL CONTRARY TO MICHIGAN STATE COURT PRECEDENT.

III.

WHETHER COLLATERAL ESTOPPEL BARS A CIVIL ACTION WHERE THE PARTIES DID NOT HAVE A FULL AND FAIR OPPORTUNITY TO LITIGATE THE CLAIM OR ISSUE DECIDED BY A PRIOR ADMINISTRATIVE DECISION.

IV.

WHETHER LOW-LEVEL STATE EMPLOYEES ARE ENTITLED TO QUALIFIED IMMUNITY WHERE THEY ACTED CONTRARY TO EXPRESS STATUTORY LAW.

PARTIES

1. American Transmissions, Inc., Plaintiff-Appellant
2. American Transmissions Land Company, Inc., Plaintiff-Appellant
3. Jay Enterprises, Inc., Plaintiff-Appellant
4. J J & T, Inc., Plaintiff-Appellant
5. Commercial Transmissions, Inc., Plaintiff-Appellant
6. John F. Folino, Plaintiff-Appellant
7. Joyce Folino, Plaintiff-Appellant
8. John A. Folino, Plaintiff-Appellant
9. Thomas A. Folino, Plaintiff-Appellant
10. Mario Bossio*, Plaintiff-Appellant
11. B & C Corp.*, Inc., Plaintiff-Appellant
12. Trans-4, Inc.*, Plaintiff-Appellant
13. Emilio Daloisio*, Plaintiff-Appellant
14. Mary Daloisio*, Plaintiff-Appellant
15. M & E Corp., Inc.*, Plaintiff-Appellant
16. General Motors Corp., Defendant-Appellee
17. Frederick Pirochta, Defendant-Appellee
18. Walter Curtis, Defendant-Appellee
19. Lucille Treganowan, Defendant-Appellee
20. Transmissions by Lucille, Inc., Defendant-Appellee
21. Fairfax Group Ltd., Defendant-Appellee

THERE IS NO PARENT OR SUBSIDIARY COMPANY TO BE LISTED UNDER RULE 29.1.

* Parties denoted with an asterisk do not join in this Petition.

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In The

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed June 4, 1991, affirmed dismissal of the case. The opinion, not recommended for publication, is reproduced in the Appendix to this Petition at pp. A-1–A-2.

The four opinions and orders of the United States District Court for the Eastern District of Michigan are unpublished.

The first district court opinion and order granted the dismissal motion of the non-governmental defendants General Motors, Treganowan, Transmissions by Lucille, and

Fairfax Group on February 9, 1990, and is reproduced in the Appendix at pp. A-3–A-16.

Petitioners sought reconsideration, to which the district court issued an opinion and order on April 27, 1990, denying reconsideration as to the dismissal of the Section 1983 claim and granting remand of the state law claims. The opinion and order are reproduced in the Appendix at pp. A-17–A-21.

The non-governmental defendants sought reconsideration, and the district court, by opinion and order of June 11, 1990, denied the motion. The opinion and order are reproduced in the Appendix at pp. A-22–A-24.

The fourth district court opinion and order granted summary judgment, on June 26, 1990, to the governmental defendants Curtis and Pirochta on the Section 1983 claim, and remanded the state law claims to state court. The opinion and order are reproduced in the Appendix at pp. A-25–A-33.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1991. This Petition has been filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

On July 18, 1989, Petitioners filed their Complaint in this civil action in the Michigan Circuit Court for the County of Wayne, alleging a Fourteenth Amendment Due Process claim via 42 U.S.C. § 1983, and four state law tort claims. The Complaint is reproduced in the Appendix at pp. A-34–A-47. Defendants removed the case to the Federal District Court, based upon federal question jurisdiction of the § 1983 claim, pursuant to 28 U.S.C. § 1331. Upon the motions of Defendants to dismiss, the United States District Court granted the motions, thereby dismissing the §1983 claim and, ultimately, remanding the state law claims to the state court. On Appeal to the United States Court of Appeals for the Sixth Circuit, the district court decision was affirmed for the reasons stated by the district court opinions.

1. On November 15, 1982, the Federal Trade Commission and Defendant General Motors Corporation entered into a consent order, requiring General Motors to implement a program to settle consumer complaints regarding, particularly, faulty transmissions which were manufactured and marketed by General Motors. Between November of 1982 and 1985, General Motors paid about forty million dollars for repairs to those transmissions under this program. The FTC Consent Order is reproduced in the Appendix at pp. A-48–A-76.

Petitioner American Transmissions, Inc. was the franchisor of a motor vehicle transmission repair business. The remaining corporate Petitioners and individual Petitioners were franchisees and owners of franchises of this business, as well as license holders to perform motor vehicle repair work in the State of Michigan.

After the FTC Consent Order was issued, General Motors solicited and obtained the participation of the

State of Michigan, Department of State, and its Bureau of Automotive Regulation (BAR) in an investigation into the business practices of transmissions repair shops. See an Internal BAR Memorandum of March 17, 1986, reproduced in the Appendix at pp. A-77–A-79. In particular, the targets of the investigation were the well-informed franchise transmission repair shops, who were advising customers of their rights pursuant to the FTC Consent Order. Petitioners became a specific target.

Through the efforts of General Motors and Fairfax Group Ltd., an ostensible investigation was organized. Lucille Treganowan and her business, Transmissions by Lucille, provided the vehicles and the technical expertise. The investigation was named "Operation Shifty".

Moreover, General Motors was "headquarters" for this investigation. Documents discovered in a companion case, brought by these Petitioners against the state agencies involved, in the Michigan Court of Claims show that the telephone number of the General Motors legal staff was headquarters for this operation, and are reproduced in the Appendix at pp. A-80–A-86.

Operation Shifty included the use of false evidence. The undercover vehicles provided to the state by the private participants, Respondents, had transmissions which were tampered with, including debris and used transmission fluid, and graphite sprayed on transmission pans which deceptively indicated malfunctioning transmissions. Also utilized in the investigation were coercive cover stories designed to pressure the transmission repair facilities into performing repairs.

The participation of the private actors, Respondents, was maintained in secret. On the surface, this was a legitimate investigation by the BAR.

On August 6, 1986, the BAR summarily suspended the licenses of Petitioners American Transmissions, Inc., Jay Enterprises, J J & T Commercial Transmissions, and the Folinos, prohibiting them from operating a motor vehicle repair facility. The state next generated a massive display of media attention to Operation Shifty and its results.

After holding administrative hearings in the Department of State, on February 17, 1989, the BAR of the Department of State revoked the facility registrations and mechanic certifications of Petitioners American Transmissions, Jay Enterprises, J J & T Commercial Transmissions and the Folinos. That administrative decision was affirmed on appeal to the State Circuit Court, and Application for Leave to Appeal that decision was denied by the Michigan Supreme Court, Docket No. 90090, on March 29, 1991.

Those administrative charges, under the Motor Vehicle Service and Repair Act of Michigan (MVSRA)[1] accused

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[1] The purpose of the Michigan Motor Vehicle Service and Repair Act, M.C.L. 257.1301 *et seq.*, M.S.A. 9.1720(1) *et seq.*, (MVSRA) stated in its Preamble, is:

> "AN ACT to regulate the practice of servicing and repairing motor vehicles; to proscribe unfair and deceptive practices; to provide for training and certification of mechanics; to provide for the registration of motor vehicle repair facilities; to provide for enforcement; and to prescribe penalties."

Section 26 of the MVSRA, M.C.L. 257.1326, M.S.A. 9.1720(26), provides the authority and guidelines for the administrative Bureau of Automotive Regulations of the Michigan D.O.S. to conduct investigations. It provides:

> "Sec. 26. (1) The administrator shall on his own initiative or in response to complaints, make reasonable and necessary public or private investigations within or outside of this state and gather evidence against a person who violated or is about to violate this act or a rule or order hereunder.
>
> (2) The administrator may:
>
> (a) Require or permit a person to file a statement in writing or otherwise as the administrator determines as to all the facts and circumstances concerning the matter to be investigated.

(*concluded on page 7*)

Petitioners of committing unfair and deceptive practices against consumers.

2. On July 18, 1989, Petitoners filed their Complaint in the instant action. Having learned of the extent of the deliberate misrepresentations employed by the state and private participants throughout Operation Shifty, Petitioners claimed unlawful deprivation of their substantive and procedural rights under the Fourteenth Amendment Due Process Clause, based upon property interests in their business and their right to earn a living and liberty interests in their good names and reputations, through 42 U.S.C. § 1983. Additionally, Petitioners brought four state law claims (App. pp. A-34–A-47). Petitioners also filed a parallel action in the Michigan Court of Claims against the state agencies.

3. After removal to the United States District for the Eastern District of Michigan by Defendants, on the motion for dismissal by the private Defendants, the court, through a series of three orders, dismissed the claim under 42

(*continued from page 6*)

(b) Mediate disputes between parties arising from violations of this act or an administrative rule.

(c) Develop conditions of probation or operation for the facility or mechanic mutually agreed upon and signed by the facility or the mechanic and the administrator instead of further disciplinary proceedings.

(d) On his own initiative, conduct spot check investigations of motor vehicle repair facilities registered or required to be registered through the state on a continuous basis to determine whether or not the facility is in compliance with this act and rules promulgated hereunder. *The administrator may not* alter the odometer on a vehicle employed in such investigations or *deliberately misrepresent the condition of the vehicle.*

(e) Conduct mechanical and diagnostic examinations of vehicles when there are reasonable grounds to believe that an unlawful act or practice was used to product the repair or to make the repair."

(Emphasis added.)

U.S.C. § 1983 for failure to state a claim and remanded the state law claims to state court.

The district court's grounds included two reasons. The first was *Noerr-Pennington* First Amendment immunity, finding that Petitioners had alleged no exceptions to the application of this immunity, the court dismissed the Section 1983 claim. Secondly, the court found that the Section 1983 claim was barred by collateral estoppel, due to the state administrative proceedings having preclusive effect and the court's "view that the requirement of mutuality ought to be excused in this case," (App. p. A-14).

In its opinion of February 9, 1990, the district court added that the separate criminal conviction of Petitioner Jay Enterprises, Inc., for attempting to obtain money under false pretenses over $100, offered further support for the bar of collateral estoppel as to Jay. (App. p. A-15). This ground is now moot due to the reversal of that conviction by the Michigan Court of Appeals on May 9, 1991. The opinion in that case, docket number 105861, is reproduced in the Appendix at pp. A-87–A-90.

As to the state employees Defendants Curtis and Pirochta, upon their Motion for Summary Judgment on the ground of qualified immunity, the district court found that the facts did not support the Section 1983 claim. The reasoning was that the administrative proceedings must be given preclusive effect, so that the alleged improprieties against Curtis and Pirochta were unfounded.

4. The Court of Appeals adopted the reasoning of the district court in affirming those decisions.

REASONS FOR ALLOWING THE WRIT

I.

NEITHER *NOERR-PENNINGTON* NOR FIRST AMENDMENT IMMUNITY SHIELDS A PRIVATE ACTOR FROM LIABILITY UNDER 42 U.S.C. § 1983, WHEN JOINTLY ENGAGED IN STATE ACTION UNDER COLOR OF LAW WITH STATE OFFICIALS.

The decision of this Court and *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), clearly reveals that the *Noerr-Pennington* doctrine should be limited to anti-trust cases.

In *City of Columbia*, plaintiff's complaint arose out of private lobbying for regulatory legislation. Plaintiff therein alleged Sherman Act anti-trust claims against the defendant City and the private defendant; that the private defendant lobbied the City to obtain new zoning ordinances which restricted billboard construction, constituting an anti-competitive conspiracy to the benefit of the private defendant and to the detriment of plaintiff's ability to compete with the private defendant.

Additionally, plaintiff alleged state law claims for trade libel, setting artificially low rates and inducement to breach contract.

As to the Sherman Act anti-trust claim against the private defendant, this Court held that the *Noerr-Pennington* doctrine did not have a conspiracy exception, so that *Noerr-Pennington* immunity applied to protect the private defendant from liability. The City was held not liable for the anti-trust claim under the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), which held that the Sherman Act does not prohibit state anti-competitive action when a state acts in a governmental capacity as a sovereign, even if the state acts contrary to the public interest and corruptly.

The *Noerr-Pennington* doctrine has never been held to apply outside the context of anti-trust actions.

In *Parker* v. *Brown*, *supra*, defendants, state agricultural officials, derived authority to operate an anticompetitive state agricultural proration program from legislative command. The purpose of the Sherman Act was not to restrain the state or its officers from acts directed by the legislature, the Court wrote, but was determined to be a prohibition against individual action —not state action. In the dual system of government, states are sovereign, 317 U.S., at 351-352.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), this Court held that private lobbying for the enactment and enforcement of legislation was political activity, not a trade restraint governed by the Sherman Act. *Id.*, 365 U.S., at 140-141. The private defendants were immune from Sherman Act liability there on two grounds. First, the concept of representative government depends upon the people's ability to make their wishes known to their representatives, which is political activity, and second, the freedom to petition as protected by the Bill of Rights which, the court observed, is a freedom it could not "lightly impute to Congress an intent to invade" [by the Sherman Act]. *Id.*, 365 U.S., at 137-138.

Next, *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d. 626 (1965), involving a Sherman Act claim, emphasized that *Noerr* provides protection from Sherman Act liability despite the anti-competitive purpose or intent of the private competitor defendant. *Id.*, 381 U.S., at 669-670.

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d. 642 (1972), involved a Clayton Act claim of conspiracy to monopolize in violation

of anti-trust laws. Continuing to recognize the dual basis of the *Noerr* reasoning, the Court in *California Motor Transport Co.* wrote that the right to petition extends to a citizen's right to approach administrative agencies and courts, so long as such conduct did not bar competitors from meaningful access to those tribunals. *Id.*, 404 U.S., at 510-511.

Hoover v. *Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d. 590 (1984), involved a Sherman Act claim against a state bar admissions committe, whose members were appointed by state legislative act. Applying *Parker* v. *Brown*, *supra*, this Court held that the acts were acts of the state, so that the action was exempt from anti-trust liability, regardless of the state's motives.

In *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988), a Sherman Act case, this Court found that a private actor did not enjoy *Noerr* immunity where it did not confine itself to political action attempting to persuade an independent decision maker, but was an economically interested party exercising biased decision-making authority in developing an industry standard. The Court's analysis characterized such action as commercial activity with a political impact, and not allowable political activity with a commercial impact.

In this Court's most recent decision, *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, *supra*, the Court found that the defendant City was immune from Sherman Act liability under *Parker* state action immunity, noting that the Sherman Act is not directed to addressing the question of whether governmental action is in the public interest, and that "Congress has passed other laws aimed at combatting corruption in state and local governments." *Id.*, 111 S.Ct., at 1353. Further, in reasoning that the private defendant there was immune from Sherman Act liability under *Noerr*,

the Court noted, "[i]f the denial was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies." *Id.*, 111 S.Ct., at 1355.

Petitioners submit that 42 U.S.C. § 1983 is one such other law aimed at combatting and providing a remedy for wrongful state action, whether such action is committed by state and/or private actors.

Moreover, after concluding that both the public and the private defendants were entitled to immunity from the anti-trust claims, the Court in *City of Columbia* remanded the state law claims for further proceedings. Nowhere in that opinion did the Court apply the *Noerr-Pennington* or First Amendment immunity to the state law claims.

Petitioners submit that the *Noerr* First Amendment doctrine does not apply to state law claims or any claims outside the anti-trust context.

To extend the application of *Noerr* immunity to the Section 1983 claim here is to negate any liability for private actors under Section 1983 when they jointly engage in state action with state officials. Further, for consistency, if *Noerr* immunity would be granted to private actors in a Section 1983 case, then *Parker* immunity would necessarily extend to all municipal and governmental actors in a Section 1983 case. Petitioners submit that such a result would be contrary to the purposes and intent of 42 U.S.C. 1983, the Constitutional rights that it protects, and the Sherman Act.

In *Adickes* v. *S. H. Kress & Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d, 142 (1970), plaintiff sued a private restaurant and the City Police for deprivation of her rights and conspiracy to deprive her rights under the Equal Protection Clause of the Fourteenth Amendment, under 42 U.S.C. § 1983. The underlying factual allegations of her complaint were that she was arrested and charged by the

city police with vagrancy after she departed from the private restaurant where she had been refused service because she was in the company of blacks. Plaintiff alleged a conspiracy between the city police and the private restaurant to deprive her of equal treatment in a place of public accomodation and to cause her arrest on a false charge of vagrancy. The Court wrote that, if plaintiff could prove that the restaurant employee and the City Policeman reached an understanding to deny her service or to cause her arrest, she could prevail on her Section 1983 claim. In relevant part, the Court wrote:

> "The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of the Petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized or lawful. Moreover, a private party involved in such a conspiracy, even though not an official of the state, can be liable under §1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the state. It is enough that he is a wilfull participant in joint activity with the state or its agents'[.]"
>
> (Citations and footnote omitted.)

Id., 398 U.S., at 152, 90 S.Ct., at 1605-1606.

See also *Dennis* v. *Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Lugar* v. *Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *West* v. *Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), all of which hold that a private defendant, jointly engaged with state officials under color of law, may be liable under

42 U.S.C. § 1983. If *Noerr* immunity applied in those cases, the private actors would have been shielded from liability.

The *Noerr* doctrine should not extend to the Section 1983 claim here. To do so would sound the death knell for liabilty of virtually every private actor in a Section 1983 violation. Although it is true that the underpinnings of the *Noerr* doctrine rest upon First Amendment rights, those same rights may not be abused so as to avoid liability for otherwise unlawful conduct. As noted by this Court in *California Motor Transport v. Trucking Unlimited, supra*,

> "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils'[.]
>
> * * *
>
> What the proof will show is not known, for the district court granted the motion to dismiss the complaint. We must, of course, take the allegations of the complaint at face value for the purposes of that motion."
>
> (Citations omitted.)

Id., 404 U.S., at 515, 92 S.Ct., at 614.

Neither the First Amendment nor this Court's decisions in its anti-trust decisions call for application of the *Noerr-Pennington* First Amendment immunity doctrine to protect Respondents.

II.

THE COURTS BELOW ERRED IN NOT FOLLOWING MICHIGAN LAW OF COLLATERAL ESTOPPEL.

The federal courts below were bound to follow the Michigan law of collateral estoppel. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Const.*

Corp., 456 U.S. 461, 466, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982); *Wicker* v. *Board of Educ. of Knott County, Ky.*, 826 F.2d 442, 450 (6th Cir. 1987).

The courts below did not follow Michigan law. Instead, they excused the Michigan requirement of mutuality.

Michigan law requires mutality of estoppel. That is, if the same parties in a subsequent lawsuit were not parties or privies to the prior action, then Michigan law will not apply the bar of collateral estoppel. *Howell* v. *Vito's Trucking & Excavating Co.*, 386 Mich. 37, 191 N.W.2d 313 (1971). After noting the trend in the law to abolish the requirement of mutuality, the Michigan Supreme Court has reaffirmed its decision in *Howell*, writing that "mutality of estoppel remains the law in this jurisdiction," *Lichon* v. *American Insurance Co.*, 435 Mich. 408, 428; 459 N.W.2d 288 (1990).

The requirement of mutuality may not be excused.

III.

COLLATERAL ESTOPPEL DOES NOT BAR AN ACTION WHERE THE PARTIES DID NOT HAVE A FULL AND FAIR OPPORTUNITY IN THE PRIOR PROCEEDING.

In addition to the above reason for the failure of the bar of collateral estoppel, the fact that plaintiffs have allegedly not received a full and fair opportunity to litigate the issues here when they were previously in the administrative proceedings offers further, separate ground for reversing the dismissal on this ground.

Finality principles of collateral estoppel do not apply where, as alleged here, an earlier decision or administrative proceeding and judicial review did not give the party "a full and fair opportunity to litigate the claim decided by the first court." *Allen* v. *McCurry*, 449 U.S. 90, 101, 101 S.Ct.

411, 66 L.2d 308 (1980); *Kremer* v. *Chemical Construction Corp.*, *supra*, 456 U.S., at 480-481.

See also *Vinson* v. *Campbell Co. Fis. Court*, 820 F.2d 194, 201 (6th Cir. 1987), allowing a Section 1983 substantive Due Process claim based upon "an egregious abuse of governmental power [which was] used for purposes of oppression," where plaintiff was deprived of the custody of her children; *Jones* v. *Alton*, 757 F.2d 878 (7th Cir. 1985), allowing a Section 1983 and Title VII suit where prior administrative discharge proceedings and judicial review refused to consider the public employees' race discrimination defense.

Compare also *Miller* v. *Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967) and *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), reversing criminal convictions upon finding the state had knowingly used false evidence or misrepresented the truth.

Collateral estoppel, the second ground for dismissal of the private defendants below, does not bar Petitioners' claims.

IV.

QUALIFIED IMMUNITY DOES NOT SHIELD STATE EMPLOYEES CURTIS AND PIROCHTA FROM LIABILITY.

As to the state employees Curtis and Pirochta, the courts below dismissed Petitioners' claims against them, upon a fact finding of qualified immunity. The decisions below rested upon the finality of the administrative proceedings against Petitioners. It is the validity of those proceedings which are in question in the instant case.

The express requirements of Section 26 of the MVSRA, *supra*, at fn. 1, were the statutory confines requiring that Curtis and Pirochta not deliberately misrepresent the con-

dition of the automobile. They did not have the discretion to avoid this statutory requirement. If reasonable officials, they should have known of it. The statute is plain on its face. The prohibition of Section 26 of the statute was clearly established. The reasonable expectation could only have been that Respondents Curtis and Pirochta knew that the statute prohibited misrepresentation of the vehicles' condition.

As described in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the shield of good faith community is not available where defendants should have known the law and acted in performance with a discretionary function. Nor does the immunity apply where the individual acts within the scope of his duties and an objective good faith. *Id.*, 457 U.S. at 818-819.

Moreover, the immunity is only available to high level executive officials who "require greater protection than those with less complex discretionary responsibilities," *Harlow* v. *Fitzgerald*, *supra*, 457 U.S., at 807. Respondent Curtis is a non-managerial low level employee of the Bureau of Automotive Regulation of the Michigan Department of State. Similarly, Respondent Pirochta is the director of a division of the Bureau of Automotive Regulation. Neither of them is a high enough executive level official so as to be afforded a qualified immunity.

They are not entitled to qualified immunity.

❧ ❧ ❧

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: August 30, 1991

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed June 4, 1991)

(AMERICAN TRANSMISSIONS, INC., ET AL., and PENTCO ENTERPRISES, INC., ET AL., Plaintiffs-Appellants, v. GENERAL MOTORS CORPORATION, ET AL., Defendants-Appellees – Nos. 90-1770, 90-1797; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM

In this consolidated appeal[1], plaintiffs appeal the district court's orders dismissing, pursuant to Fed. R. Civ. P. 12 (b)(6) and 56 their civil rights claim brought under 42 U.S.C. § 1983. The actions, removed from state court, arose from the 1986 investigation and administrative fraud proceedings brought against plaintiff transmission repair shops and their owners and shareholders by the Michigan Department of State under the Motor Vehicle Service and

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[1] *American Transmissions, Inc. v. General Motors Corp.*, Civ. Action No. 89-CV-72470-DT (E.D. Mich. February 9, 1990); and *Pentco Enterprises, Inc. v. General Motors Corp.*, Civ. Action No. 89-CV-72471-DT (E.D. Mich. February 13, 1990).

Repair Act, Mich. Comp. Laws § 257.1301 *et seq.* Plaintiffs contended that the defendants violated their civil rights under 42-U.S.C. § 1983, by rigging the State's investigation (dubbed "Operation Shifty") through a misleading use of transmissions so that plaintiffs would be found guilty of consumer fraud.

On appeal plaintiffs argue that the district court erred in ruling that: (1) defendants' concerted participation in the "Operation Shifty" investigation was protected under first amendment immunity; (2) plaintiffs' claims were barred by collateral estoppel; and (3) the government defendants Pirochta and Curtis were entitled to qualified immunity.[2] Having carefully considered the record on appeal and the briefs of the parties, we find that the district court did not err as a matter of law.

Because the reasons articulated by the district court in its February 9, 1990, February 13, 1990, and June 26, 1990 opinions adequately resolve the issues raised in this appeal, we affirm the judgments of the district court for the reasons set forth in those opinions.[3]

AFFIRMED.

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[2] The district court granted the defendants' Pirochta and Curtis's motion for summary judgment on grounds of qualified immunity on June 26, 1990. *American Transmissions, Inc. v. General Motors Corp.*, Civ. Action No. 89-CV-72470-DT (E.D. Mich. June 26, 1990).

[3] The Supreme Court's recent decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 59 U.S.L.W. 5259 (April 1, 1991), does not alter our conclusion.

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated February 9, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HONORABLE PATRICK J. DUGGAN)

OPINION

This suit, removed from state court, arises from the investigation and subsequent administrative prosecution of the plaintiff transmission repair shops.[1] The shops were accused of (and, ultimately, convicted of) consumer fraud. Plaintiffs'[2] complaint essentially charges that defendant General Motors Corporation ("GM"), in concert with the

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[1] One such shop, Jay Enterprises, Inc., was criminally prosecuted as well.

The Court also notes that plaintiffs Emilio and Mary Daloisio, Mario Bastio, B & C Corp. Inc., Trans-4, Inc. and M & E Corp. Inc. presently deny being the subject of any prior administrative proceedings. The import of this denial is discussed later.

[2] In addition to the various repair shops or entities, the named plaintiffs include the shareholders, *i.e.*, owners, of such shops.

other named defendants, sought to wrongfully eliminate transmission repair facilities thereby limiting GM's obligations under a Federal Trade Commission consent agreement. (Pursuant to such consent agreement, plaintiffs observe, car owners who experienced problems with GM-built transmissions were reimbursed by GM for repair costs incurred. Plaintiffs additionally observe that many repair facilities, including those before the Court today, informed customers of their rights under the agreement.) In particular, plaintiffs' complaint alleges:

> 32. At dates and times uncertain in approximately late 1985 or early 1986, all Defendants illegally agreed and conspired to violate the civil rights of these Plaintiffs and others by attacking, intimidating and disparaging various chain transmission facilities . . . .
>
> * * *
>
> 34. At various times in February and March of 1986, Defendant General Motors, Defendant State of Michigan through its Bureau of Automotive Regulation officials and representatives, including Frederick Pirochta, met at various times and locations, including various meetings at the GM Building in Detroit, Michigan, to coordinate ostensibly an investigation, actually an attack, upon the chain transmissions facilities . . . .

In this vein, plaintiffs further maintain that, though innocent, *in fact*, of any wrongdoing, the aforementioned investigation was fixed or rigged, *i.e.*, designed and conducted to find plaintiffs, among others, guilty of consumer fraud. See paragraph 38 of the complaint which reads:

> Decisions were made by various individuals employed by Defendants, including Lucille

Treganowan, various State of Michigan officials, Michael Hirschman of Fairfax Group Limited and various General Motors Corporation officials to:

(a) Utilize graphite in the investigation;

(b) Not to flush cooler lines;

(c) To utilize the various coercive cover stories developed by General Motors Corporation and Fairfax Group, Limited;

(d) To utilize transmission pans containing debris,

(e) To utilize used transmission fluid in conducting these investigations; and

(f) To mislead mechanics into believing that the investigative transmissions were damaged and needed repairs.

Based on these and the remaining allegations of the complaint, plaintiffs seek damages pursuant to 42 U.S.C. § 1983 and various state law theories.

Now pending before the Court is a motion to dismiss filed jointly by the so-called "non-government" defendants.[3] See Fed.R.Civ.P. 12(b)(6). For the reasons stated below, the motion will be granted.

A 12(b)(6) motion tests the legal sufficiency of a complaint, not the facts that support it. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1356, p. 590 (West 1969). In practice, then,

> [w]hen evaluating a motion to dismiss brought pursuant to rule 12 (b)(6), the factual allegations in

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[3] In addition to GM, the movants (and their respective "role" in the alleged conspiracy) are: Transmissions By Lucille, an out-state transmission shop which furnished transmissions for investigators to use; its owner Lucille Treganowan; and the Fairfax Group, Ltd., which plaintiffs assert, wrote misleading cover stories.

> the complaint must be regarded as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.* 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).

Windsor v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). See also *Dugan* v. *Brooks*, 818 F.2d 513, 516 (6th Cir. 1987), *citing Windsor*. Applying this accepted rule, that is, viewed in a light most favorable to plaintiffs and resolving every doubt in their behalf, the Court is nonetheless of the opinion that an actionable § 1983 claim has not been pled. Such claim then, together with the pendent state law claims, *see United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), must be dismissed.

As explained more fully below, the Court, *initially*, is satisfied that plaintiffs' allegations do not invoke any recognized exception to the First Amendment immunity afforded defendants by case law. *Alternatively*, the Court finds that the allegations forming the core of plaintiffs' claim, *i.e.*, that the investigation was improper, were considered and rejected in the underlying administrative proceedings. As a result, the doctrine of collateral estoppel applies, thus precluding this Court's consideration of such allegations.

A. NOERR-PENNINGTON IMMUNITY

In a line of cases beginning with *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), the United States Supreme Court and lower courts have held, as summarized in *Potters Medical Center* v. *City*

Hosp. Assn, 800 F.2d 568 (6th Cir. 1986), "that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability." *Id.* at 578. As explained in *Potters*, immunity is conferred on two grounds: "the First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government." *Ibid.*, citing *Noerr, supra* at 137-138. Important for present purposes, the Potters court also observed that "the protection of the *Noerr-Pennington* doctrine [had been extended] to efforts *to influence administrative agencies* and the courts. 800 F.2d at 578, citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Although developed in the context of antitrust liability, defendants correctly note that the scope of the *Noerr-Pennington* doctrine has been enlarged "to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 . . . ." *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988), *cert. denied sub nom., City of Dallas v. Video Int'l Prod., Inc.*, __U.S.__, 109 S.Ct. 1955 (1989). See also Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), rev'd on other grounds, 477 U.S. 299 (1986). Relying on *Noerr-Pennington* immunity (as subsequently expanded), defendants accordingly urge the Court to dismiss plaintiffs' section 1983 claim.

The immunity defendants raise, however, is *not* absolute; as the *Noerr-Pennington* doctrine has developed, so too have exceptions. The court in *Video Int'l, supra*, traced this latter development and provided the following analysis:

> Possible exceptions to this doctrine were first noted in *Noerr* and *Pennington* and have since developed more fully. Our reading of both the law in

general and the briefs in this case indicates that there is a substantial amount of confusion over the extent of and distinction between these exceptions. We will thus explain our interpretation of these exceptions based upon their purposes.

Much of the confusion surrounding the doctrine and its exceptions arises from the lack of a definition of, and distinction between, two separate exceptions: the "sham" exception and the "co-conspirator" exception. These two separate ideas are often confusingly interchanged in the case law . . . . Nonetheless we discern these two ideas as separate and deriving from slightly different policy objectives.

The "sham" exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that "petitions" the government engaging in administrative processes only to preclude or delay its competitor's access to those processes may be liable for antitrust damages under the "sham" exception. . . .

* * *

. . . We agree that although sometimes a sham petition may coincide in a case with an illegal conspiracy with government officials, it need not always do so, and it is the illegal conspiracy that is the essence of this second exception to the *Noerr-Pennington* doctrine. We must thus examine whether

> such an illegal conspiracy existed between WAX and City officials sufficient to activate the co-conspirator exception.
>
> Our reading of the cases involving the "co-conspirator" exception demonstrate that this exception has been applied in cases where a government official or body has been influenced by the petitioner through some corrupt means. *See, e.g., Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984). Although WAX argues that the exception will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception.

858 F.2d at 1082-1083. Opposing defendants' motion, plaintiffs rely on the "sham" and "co-conspirator" exceptions. The Court finds such reliance misplaced.

Regarding the "co-conspirator" exception, the Court notes that several circuits have questioned its validity. *See First Am. Title Co. of S. Dakota v. S. Dakota Land Title Ass'n*, 714 F.2d 1439, 1446 n. 6 (8th Cir. 1983) (listing cases), *cert. denied*, 464 U.S. 1042 (1984). The following passage is illustrative of the criticism voiced:

> In the case at bar, the allegations on the basis of which the defendant mayor and alderman are said to have been co-conspirators are that they were persuaded by two members of the public, who are also defendants, to support the CATV application and to oppose plaintiff's application, and that they were

given campaign contributions "in exchange" for this undertaking. These allegations do not take the case outside the protection of the *Noerr* doctrine. Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a "conspiracy," and that if some of the "conspirators" persuade a member of the legislative body to agree to support their cause, he becomes a "co-conspirator" and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine. It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became such "co-conspirators." A holding that participation by members of the legislative body to the extent alleged here rendered the *Noerr* doctrine inapplicable to a campaign to induce legislative action, would, like a holding "that the knowing infliction of . . . injury renders the campaign itself illegal . . . [,] be tantamount to outlawing all such campaigns." Cf. *Noerr*, 365 U.S. at 143-144, 81 S.Ct. at 533.

Moreover, we can find no rational basis in the authorities or plaintiff's argument for holding that such participation by a member of the legislative body as is here alleged should cause the Sherman Act to apply to an effort to induce governmental action that is otherwise protected by *Noerr*. Nothing in the *Noerr* opinion or any other case of which we are aware suggests any reason for believing that Congress, not having intended the Sherman Act to apply to combined efforts to induce legislative action, did intend the Act to apply if a member of the legislative body agreed to support those efforts.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 230 (7th Cir. 1975).

This Court, too believes that unless meaningfully limited, the "co-conspirator" exception would swallow the general *Noerr-Pennington* rule. Accordingly, the Court thereby accepts and adopts, in the absence of Sixth Circuit precedent, the requirement alluded to in *Video Int'l, supra:* "the official with whom the [defendant] conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the [defendant] to result in an illegal conspiracy sufficient to activate the co-conspirator exception." 858 F.2d at 1083. A review of plaintiffs' complaint discloses no allegation satisfying the "selfish or otherwise corrupt motive" requirement.

Turning to the "sham" exception, described earlier, the Court similarly finds plaintiffs' allegations inadequate. Simply put, in light of the administrative action taken against plaintiffs, *i.e.*, the license revocations, which the complaint acknowledges, it cannot be said that defendants' conduct was of the "'baseless' sort . . . to which the sham exception applies . . . ." *Potters*, 800 F.2d at 579 (citations omitted).[4]

Finally, and apart from the "co-conspirator" and "sham" exceptions, plaintiffs argue, *without* citation, that the degree of assistance provided by defendants to the state investigators went beyond constitutionally protected "petitioning" of the government. The Court disagrees, believing defendants' conduct to be comparable to the immunized assistance given to law enforcement authorities in *Ottens-*

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[4] In this Court's opinion, plaintiffs' charge of investigative impropriety was rejected, largely, as *factually* unfounded. (See exhibit C of defendants' appendix, pp. 167-176.) Because, under Michigan law, "[g]reat deference is given to the findings of an administrative hearing or other administrative officer sitting as the trier of fact[,]" *Kelly v. Liquor Control Comm'n*, 131 Mich. App. 600, 602 (1983) (citation omitted), the pendency of a civil action for judicial review of the administrative proceedings in Wayne County Circuit Court (alluded to, but not documented by, plaintiffs) does not alter this Court's conclusion that the "sham" exception is unavailing.

meyer v. *Chesapeake & Potomac Tel. Co. of Maryland*, 756 F.2d 986 (4th Cir. 1985) and *Forro Precision, Inc.* v. *Int'l Business Mach.*, 673 F.2d 1045 (9th Cir. 1982).

In sum, the Court holds that plaintiffs' allegations do not strip defendants of the immunity (which they have affirmatively raised) afforded them by applicable case law.

B. COLLATERAL ESTOPPEL

Defendants also raise, as a second basis for dismissal, the doctrine of collateral estoppel. The Court agrees with defendants that the state administrative factfinding must be given preclusive effect. As instructed in *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986),

> when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate," *Utah Construction & Mining Co.*, *supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

478 U.S. at 799 (footnote omitted). *See also Pilarowski* v. *Macomb County Health Dep't*, 841 F.2d 1281 (6th Cir.), cert. denied, __U.S.__, 109 S.Ct. 133 (1988).

Here, plaintiffs essentially defended the charges brought in the underlying administrative proceedings by attacking the integrity of the State's investigation. In short, such attack was rejected; specifically rejected were contentions that GM's assistance was improper, and that the transmissions used in the undercover investigation were unreliable or inadequate. These contentions presently form the *core* of plaintiffs' section 1983 claim. To allow plaintiffs the opportunity to *relitigate them before this Court* is simply impermissible. The concerns identified in *Elliott*, *supra*, namely, the erosion of federalism, the risk of inconsistent results, *etc.*, apply with equal force here. Plaintiffs' argument to the

contrary is, as construed by this Court, two-fold. *First*, plaintiffs maintain that in the underlying administrative action, it was never resolved whether defendants had deprived them (plaintiffs) of liberty and/or property without due process of law in violation of the Fourteenth Amendment's guarantee. While true, such contention nevertheless does *not* counsel against this Court's conclusion that the underlying administrative proceedings must be afforded preclusive effect. Again, as stated above, the allegations forming plaintiffs' section 1983 claim have been resolved (adversely, the Court adds, to plaintiffs). That plaintiffs did not attach a section 1983 label to their allegations below is plainly inconsequential.

Second, plaintiffs contend that Michigan law (which, *Elliott*, *supra* teaches, provides the rule of decision), with its continuing adherence to the so-called "mutuality" requirement, denies preclusive effect to the administrative proceedings below as to the defendant movants today (*i.e.*, the "non-government" defendants). Mutuality, used in this context, simply means that "both the litigants must be alike concluded by the [prior] judgment or it binds neither." *Howell v. Vito's Trucking Co.*, 386 Mich. 37, 45 (1971) (footnote and internal quotations omitted). Here, plaintiffs observe, defendants were not parties to the underlying administrative proceedings. Except as noted below, the Court finds this second contention equally unpersuasive.[5]

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[5] As noted earlier, plaintiffs Bossio, the Daloisio's, B & C Corp. Inc., Trans-4, Inc., and M & E Corp., Inc., deny being the subject of any prior administrative proceedings, and by implication, then, deny losing their respective licenses. Accepting such denial, defendants thus argue that these plaintiffs have not suffered any injury to a constitutionally-protected (specifically, a Due Process Clause-protected) interest. The Court disagrees. Mindful of the prevailing 12(b)(6) standard, the Court believes these plaintiffs have suffered an injury of the kind alluded to in *Wisconsin v. Constantineau*, 400 U.S. 433 (1973), the holding in which the court left undisturbed in *Paul v. Davis*, 424 U.S. 693 (1976), defendants primary citation. Consequently, the "collateral estoppel" grounds for dismissal discussed in this opinion, does not apply to these plaintiffs.

Assuming, without deciding, that *Howell* is good law (see, however, *Knoblauch* v. *Kenyon*, 163 Mich. App. 712 (1987))[6], the Court is nonetheless of the view that the requirement of mutuality ought to be excused in this case. In *Knoblauch*, *supra*, the court held that, as to issues determined in a criminal prosecution, collateral estoppel may be defensively asserted, *i.e.*, invoked by a defendant in a subsequent civil action. Here, too, defendants in this, a subsequent civil action, assert collateral estoppel and, accordingly, this Court finds *Knoblauch* instructive. Because the reasoning advanced in *Knoblauch* is no less persuasive where, as here, the underlying administrative proceedings are akin to criminal prosecutions (and, indeed, can be fairly characterized as quasi-criminal), the Court, on the strength of *Knoblauch*, will collaterally estop plaintiffs from litigating the section 1983 claim brought. (The holding in

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[6] In *Knoblauch*, the court made the following pointed observations:

> In these days of congested dockets, we find too little satisfaction in strict adherence to the mutuality requirement, where, as here, the issue presented has been decided and appealed and the plaintiff has had a full and fair opportunity to litigate the question in his prior case. This collective dissatisfaction is compounded by the fact that the legal underpinnings of *Howell* have been largely eroded in the last decade. The mutuality requirement set forth in the Restatement (First) and cited in *Howell* has been dropped in Restatement Judgments (Second), §§ 27-29, pp 119-123. 1B Moore, Federal Practice, also relied upon by the *Howell* Court, now states that the states adhering to the mutuality requirement "constitute a small minority." Paragraph 0.441[3.-2], p 735. At least two of the states cited in *Howell* for their adherence to the rule have abrogated it in certain situations. See *Oates* v. *Safeco Ins. Co. of America*, 583 SW2d 713 (Mo, 1979), and *Continental Can Co.* v. *Hudson Foam Latex Products, Inc.*, 129 NJ Super 426; 324 A2d 60 (1974). Under *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 US 313; 91 S.Ct. 1434; 28 L Ed 2d 788 (1971), and *Parklane Hosiery Co., Inc* v. *Shore*, 439 US 322; 99 S.Ct. 645; 58 L Ed 2d 552 (1979), one not a party or a privy may now use collateral estoppel both defensively and offensively in federal courts applying federal law.

163 Mich. App. at 721.

Knoblauch clearly applies to dispose of, on collateral estoppel grounds, plaintiff Jay Enterprises, Inc.'s section 1983 claim. Such plaintiff, as previously noted, had been criminally (in addition to administratively) prosecuted and convicted in Recorder's Court.)

In sum, then, this Court, faithful to *Elliott*, *supra*, "must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." 478 U.S. at 799 (footnote omitted). As construed by this Court, Michigan law would afford preclusive effect to the administrative proceedings below. In addition to *Knoblauch*, *supra*, see also *Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 399 Mich. 449 (1976). Accordingly, plaintiffs' section 1983 claim is subject to dismissal on alternate grounds, *i.e.*, on grounds other than the *Noerr-Pennington* doctrine discussed above. The factual issues determined below and necessary to plaintiffs' section 1983 claim may not now be relitigated.

C. PENDENT STATE CLAIMS

Having dismissed the section 1983 claim, the Court hereby dismisses plaintiffs' pendent state claims pursuant to *Gibbs*, *supra*. *See also Province v. Cleveland Press Publishing Co.*, 787 F.2d 1049, 1055 (6th Cir. 1986) ("[t]hrough a series of cases following *United Mine Workers* [v. *Gibbs*], this circuit has adopted the position that the district courts have minimal discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial") (citation omitted).

For the reasons stated,[7] it is this Court's opinion that defendants GM, Transmissions By Lucille, Lucille Treganowan and the Fairfax Group, Ltd.'s motion to dismiss must be GRANTED.

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[7] The Court does not reach defendants' argument that the elements of a section 1983 claim, articulated in *Parrat v. Taylor*, 451 U.S. 527, 535 (1981), have not been alleged.

An order consistent with this opinion shall issue.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: February 9, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Thomas A. Gottschalk, Esq..

ORDER

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on February 9, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT.

This matter is before the Court on defendants General Motors Corporation, the Fairfax Group, Ltd., Transmissions by Lucille and Lucille Treganowan's motion to dismiss brought pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons set forth in an opinion issued this date,

IT IS ORDERED that such motion is GRANTED.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: February 9, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Thomas A. Gottschalk, Esq..

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed April 27, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J.J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HON. PATRICK J. DUGGAN)

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on April 27, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT.

This is, in part, a section 1983 action removed from the Wayne County Circuit Court. Plaintiffs charge that defendant General Motors Corporation ("GM"), in concert with the other named defendants, wrongfully sought to, and ultimately did, eliminate the transmission repair facilities owned by or affiliated with the plaintiffs thereby limiting GM's obligations under a Federal Trade Commission consent agreement.[1] Specifically, it is *alleged* that the defen-

[1] Pursuant to such consent agreement, plaintiff's complaint observes, car owners who experienced problems with GM-built transmissions were reimbursed by GM for repair costs incurred. The complaint additionally observes that many repair facilities, including those named as plaintiffs in this lawsuit, informed customers of their rights under the agreement.

dants, at GM's initiative, fixed or rigged an investigation to find plaintiffs guilty of consumer fraud though they were innocent, *in fact*, of any wrongdoing. Such investigation led to the administrative prosecution of the plaintiff repair shops by State of Michigan authorities.

In an opinion dated February 9, 1990 (a separate order was entered that same day), this Court held that plaintiffs had not stated an actionable section 1983 claim against the so-called "non-governmental defendants, *i.e.*, defendants G.M., Transmissions by Lucille, Lucille Treganowan, and Fairfax Group, Ltd. (Only *these* defendants had moved to dismiss.) *See, generally*, Fed.R.Civ.P. 12(b)(6). The Court's reasoning was two-fold. *Initially*, the Court was satisfied that plaintiffs' allegations did not invoke any recognized exception to the First Amendment immunity afforded defendants by case law. *Alternatively*, the Court found that the allegations forming the *core* of plaintiffs' section 1983, *i.e.*, that the investigation was improperly rigged or fixed, were considered and rejected in the underlying administrative proceedings. Accordingly, the Court determined that the doctrine of collateral estoppel applied, thus precluding further judicial review of such allegations. Having dismissed the section 1983 claim, the pendent state law claims against the non-governmental defendants were dismissed as well.

Presently, plaintiffs move the Court to reconsider its opinion of February 9, 1990. For the reasons stated below, such request is granted, in part, and denied, in part.

A. SECTION 1983 CLAIM

Under Local Rule 17(m)(3),

> motions for rehearing or reconsideration which merely present the same issues ruled upon the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only

> demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Here, plaintiffs do not raise any issues not considered by the court in its prior ruling dismissing their section 1983 claim.[2] Relatedly, plaintiffs have not demonstrated a "palpable defect" within the meaning of Rule 17(m)(3), nor have they convinced the Court that a "different disposition of the case must result . . . ." What was said, then, in *Durkin v. Taylor*, 444 F. Supp. 879 (E.D. Va. 1977) is particularly instructive:

> Whatever may be the purpose of [Fed.R.Civ.P. 59, pursuant to which motions for reconsideration are treated, *see Sidney Vinstein v. A.H. Robins Co.*, 697 F.2d 880 (9th Cir. 1983),] it should not be supposed that is intended to give an unhappy litigant one additional chance to sway the judge.
>
> Since the plaintiff has brought up nothing new – except his displeasure – this Court has no proper basis upon which to alter or amend the order previously entered.

444 F. Supp. at 889.

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[2] Though the decision was previously considered, the Court sees fit to briefly address *Huron Valley Hosp., Inc. v. City of Pontiac*, 650 F.Supp. 1325 (E.D. Mich. 1986), *aff'd*, 849 F.2d 262 (6th Cir. 1988), upon which plaintiffs place renewed reliance. Their reliance is misplaced. There, the district court judge held that the evidence did not support the claimed conspiracy. He did not consider, and, thus, did not reject, the limitations to the co-conspirator exception to First Amendment immunity this Court imposed. Simply stated, he had no occasion to. Consequently, neither his opinion nor the Sixth Circuit's opinion is inconsistent with this Court's ruling.

Regarding the Court's collateral estoppel holding, plaintiffs make much of the Court's departure from (or relaxation of) the mutuality requirement. The Court remains convinced that *Knoblauch v. Kenyon*, 163 Mich.App. 712 (1987), authorizes such departure.

In short, plaintiffs have not satisfied the standard incorporated in Local Rule 17(m)(3). Thus, as was the case in *Durkin*, *supra*, the Court is without a proper basis to grant plaintiffs' request for reconsideration of the decision dismissing their section 1983 claim.[3]

B. PENDENT STATE LAW CLAIMS

As alluded to earlier, the Court also dismissed plaintiff's pendent state law claims filed against the non-governmental defendants. The Court, upon further reflection, agrees with plaintiffs that the better course is to *remand* these pendent claims to state court (as opposed to *dismissing* them). See Carnegie-Mellon Univ. v. Cohill, __U.S.__, 107 S.Ct. 1283 (1988).[4]

Accordingly, for the reasons stated above,

IT IS ORDERED that plaintiff's Motion for Reconsideration is GRANTED, IN PART, and DENIED, IN PART.

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[3] Regarding the section 1983 claim, plaintiffs alternatively ask the Court for the opportunity "to amend their Complaint to . . . add additional averment which would embellish upon the frailties suggested by the Court's Opinion [of February 9, 1990]." Brief in support, at p. 14 (citation omitted). Plaintiffs however, have not presented a proposed amended complaint. Other than their conclusory, self-serving suggestion that the amended complaint will "embellish upon the frailties" of the original complaint, the Court is thus without the information needed to evaluate this alternative request. Accordingly, such alternative request to amend is DENIED.

[4] The Court notes that with the dismissal of the section 1983 claim against the non-governmental defendants, it is the decision in *Aldinger v. Howard*, 427 U.S. 1 (1976), not previously cited by this Court which precludes this Court's consideration of the state law claims against these same defendants. Simply put, such dismissal makes the non-governmental defendants pendent "parties" as that term is explained and used in *Aldinger*. As further explained in *Aldinger* (where the Supreme Court refined the analysis in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the decision this Court previously cited), section 1983 does not confer subject matter jurisdiction over pendent parties. Thus, though a section 1983 claim is pending against the state or governmental defendants, this court nonetheless cannot entertain the state law claims against the non-governmental defendants.

IT IS FURTHER ORDERED that the Court's order of February 9, 1990 is amended to read as follows:

> IT IS ORDERED that such motion is GRANTED as to plaintiffs' section 1983 claim.
>
> IT IS FURTHER ORDERED that plaintiff's pendant state claims against the non-governmental defendants are REMANDED to the Wayne County Circuit Court.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: April 27, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Brian D. Devlin, Esq..

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed June 11, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLIÑO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants – CIVIL ACTION NO.: 89-CV-72470-DT; HON. PATRICK J. DUGGAN)

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on June 11, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT.

In this matter, the so-called "non-government" defendants (*i.e.*, defendants General Motors Corporation, Transmissions by Lucille, Lucille Treganowan and the Fairfax Group, Ltd.) request the Court to reconsider its decision remanding the state law claims filed against them to Wayne County Circuit Court. Because the Court has *not*, to date, considered the views of these defendants regarding the remand of such claims,[1] their motion for reconsideration is

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[1] Remand of the claims was ordered pursuant to *plaintiffs'* earlier-filed motion for reconsideration to which the defendants did not respond and, indeed, under local rules, could not respond. *See* Local Rule 17(m)(2).

granted. On the merits, however, the motion is denied for the following reasons.

Essentially, the non-government defendants (hereinafter the "defendants") urge the Court to apply the reasoning adopted by the Court in its opinion and accompanying order of February 9, 1990, wherein plaintiffs' lone federal (*i.e.*, section 1983) claim was dismissed, in part, on *Noerr-Pennington* immunity grounds, to the state law claims. Rather than *remanding* the state law claims (and, in defendants' words, "perpetuating" this action), the defendants ask the Court to *dismiss* such claims pursuant to Fed.R.Civ.P. 12(b)(6). Upon further reflection, the Court adheres to its view, previously expressed, that the better course is to remand the state law claims.

In asking that the Court dismiss plaintiffs' state law claims pursuant to Rule 12(b)(6), the defendants also ask that the Court retain *jurisdiction* over these claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), however, instructs: "Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *Id.* at 726 (footnote omitted).[2] And in *Province* v. *Cleveland Press Pub. Co.*, 787 F.2d 1047 (1987), the Sixth Circuit wrote:

> Through a series of cases following [*Gibbs*], this circuit has adopted the position that the district courts have *minimal* discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial. *See Service, Hospital, Nursing Home and Public Employees Union* v. *Commercial Properties Services*, 755 F.2d

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[2] Because the plaintiff in *Gibbs* brought suit in federal court, remand "was not an option in [that] case." *Carnegie-Mellon Univ.* v. *Cohill*, __U.S.__, 108 S.Ct. 614, 619 (1988). This fact explains why the *Gibbs* Court spoke of dismissal, not remand. *Ibid.* In this instant matter, remand is, as *Carnegie-Mellon* teaches, a viable option.

> 499, 506 n.9 (6th Cir. 1985) ("this circuit has moved away from the position that the court has discretion to retain jurisdiction over a pendent state claim where the federal claim has been dismissed before trial.").

Id. at 1055 (emphasis added). The instant case presents no occasion to exercise such minimal discretion.

Simply put, while economy may be realized if the Court were to resolve the state law claims (primarily because there is similarity between the factual allegations predicating both the federal and state claims), it *cannot* be said that the interest in judicial economy is "overwhelming". *Ibid.* Unlike the situation confronting the court in *Province*, discovery has not yet closed nor has a "substantial amount of time and resources . . . been expanded." *Ibid.*

Accordingly, for the reasons stated above and consistent with its previous decision, the Court remands plaintiffs' state law claims against the non-governmental defendants to Wayne County Circuit Court for further proceedings.

IT IS ORDERED.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: June 11, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee A. Schutzman, Esq., Bruce D. Devlin, Esq. Thomas A. Gottschalk, Esq..

DISTRICT COURT OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed June 26, 1990)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J.J & T. INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F. FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C. CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E. CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, THE STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, and FAIRFAX GROUP, LTD., Defendants — CIVIL ACTION NO.: 89-CV-72470-DT; HON. PATRICK J. DUGGAN)

OPINION

This suit, removed from state court, arises from the investigation and subsequent administrative prosecution of the plaintiff transmission repair shops.[1] The shops were accused of (and, ultimately, convicted of) consumer fraud. Plaintiffs' complaint essentially charges that defendant General Motor Corporation ("GM"), in concert with the other named defendants, sought to wrongfully eliminate transmission repair facilities thereby limiting GM's obliga-

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[1] One such shop, Jay Enterprises, Inc., was criminally prosecuted as well.

The Court also notes that plaintiffs Emilio and Mary Daloisio, Mario Bassio, B & C Corp. Inc., Trans-4, Inc. and M & E Corp. Inc. wee not the subjects of any prior administrative proceedings. The import of this fact is discussed later.

tions under a Federal Trade Commission consent agreement. (Pursuant to such consent agreement, plaintiffs observe, car owners who experienced problems with GM-built transmissions were reimbursed by GM for repair costs incurred. Plaintiffs additionally observe that many repair facilities, including those before the Court today, informed customers of their rights under the agreement.) In particular, plaintiffs' complaint alleges:

> 32. At dates and times uncertain in approximately late 1985 or early 1986, all Defendants illegally agreed and conspired to violate the civil rights of these Plaintiffs and others by attacking, intimidating and disparaging various chain transmission facilities . . . .
>
> * * *
>
> 34. At various times in February and March of 1986, Defendant General Motors, Defendant State of Michigan through its Bureau of Automotive Regulation officials and representatives, including Frederick Pirochta, met at various times and locations, including various meetings at the GM Building in Detroit, Michigan, to coordinate ostensibly an investigation, actually an attack, upon the chain transmissions facilities . . . .

In this vein, plaintiffs further maintain that, though innocent, *in fact*, of any wrongdoing, the aforementioned investigation was fixed or rigged, *i.e.*, designed and conducted to find plaintiffs, among others, guilty of consumer fraud. See paragraph 38 of the complaint which reads:

> Decisions were made by various individuals employed by Defendants, including . . . various State of Michigan officials, . . . to:

(a) Utilize graphite in the investigation;

(b) Not to flush cooler lines;

(c) To utilize the various coercive cover stories developed by General Motors Corporation and Fairfax Group, Limited;

(d) To utilize transmission pans containing debris,

(e) To utilize used transmission fluid in conducting these investigations; and

(f) To mislead mechanics into believing that the investigative transmissions were damaged and needed repairs.

Finally, at paragraph 48, plaintiffs allege that "a massive display of publicity . . . [was] generated by the officials of the State of Michigan . . . intentionally directing the public to avoid use of chain transmission facilities . . . ." Based on these and other allegations, plaintiffs seek damages pursuant to 42 U.S.C. § 1983 (complaining of a due process violation) and various state law theories.

Defendants Pirochta and Curtis, two of the state officials referred to above, presently move for summary judgment. For the reasons provided below, the Court concludes that these defendants are entitled to summary judgment on plaintiffs' section 1983 claim.

The doctrine of qualified immunity provides the basis for this conclusion. Such doctrine was discussed in *Anderson* v. *Creighton*, ___U.S.___ , 107 S.Ct. 3034 (1987). There, the Court began by reaffirming the standard announced in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1981):

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action[,]

> *Harlow*, 457 U.S., at 819, 102 S.Ct., 2739, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.*, at 818, 102 S.Ct., at 2738.

107 S.Ct. at 3038. In a passage particularly pertinent to the due process claims confronting this Court, the Supreme Court elaborated:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violated that clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the

> very action in question has previously been held unlawful, see *Mitchell*, 472 U.S., at 535, n.12, 105 S.Ct., at 2820, n.12; but it is to say that in the light of preexisting law the unlawfulness must be apparent. . . .

107 S.Ct. at 3038-3039 (citations omitted). *See also Danese v. Asman*, 875 F.2d 1239, 1242 (6th Cir. 1989).

Thus, in determining whether or not these defendants are entitled to the defense of qualified immunity, this Court must address the "fact-specific" question of whether a reasonable person could have believed that the conduct plaintiff now complains of was lawful, taking into consideration all of the information the defendants possessed and the preexisting judicial interpretation of the Due Process Clause. *Anderson*, 107 S.Ct. at 3040. Answering this question,[2] the Court finds defendants' actions objectively reasonable. In this Court's opinion, then, qualified immunity thus attaches, and defendants are entitled to summary judgment on plaintiffs' section 1983 claim.

As alluded to earlier, plaintiffs, in part, attack the integrity of the State's investigation. Specifically, they charge that the condition of the transmissions used in the undercover investigation was fixed, or, to use the terms of M.C.L.A. 257.1326(d), "deliberately misrepresented", in violation of such statute. This charge, however, is *factually unfounded*. In the state administrative proceedings, the decisionmaker rejected plaintiffs' allegation (raised again here) that the condition of the transmissions was deliberately misrepresented. And this finding by the state decisionmaker must be given preclusive effect. See *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), where the Supreme Court instructed:

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[2] This is a legal question to be decided by the Court. *See Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

> [W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate," *Utah Construction & Mining Co., supra*, 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Id. at 799 (footnote omitted). *See also Pilarowski v. Macomb County Health Dep't*, 841 F.2d 1281 (6th Cir.), *cert. denied*, ___U.S.___ , 109 S.Ct. 133 (1988). Michigan law, as construed by this Court, would afford preclusive effect. *See Senior Accountants, Analysts & Appraisers Ass'n v. City of Detroit*, 399 Mich.App. 449 (1976). *Cf. Knoblauch v. Kenyon*, 163 Mich.App. 712 (1987). Because the allegations as to the investigation's purported improprieties are unfounded, it cannot be said that defendants Pirochta and Curtis acted unreasonably (or, indeed unlawfully). Regarding the investigation, then, they enjoy qualified immunity.[3]

As further alluded to earlier, plaintiffs Emilio and Mary Dalosio, B & C Corp. Inc., Trans-4, Inc. and M & E Corp. were not subjected to any administrative proceedings. Consequently, their complaint is not directed against the investigation or subsequent proceedings; rather, they complain

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[3] In an opinion dated February 9, 1990, the Court dismissed plaintiffs' section 1983 claim against the so-called "non-governmental" defendants named in this action (i.e., G.M., Transmissions by Lucille, Lucille Treganowan and the Fairfax Group, Ltd.) reasoning, in part, that these non-governmental defendants enjoyed *Noerr-Pennington* immunity. Such immunity, derived from the First Amendment, permits private parties to petition the government to induce governmental action. The Court's holding today that defendants Pirochta and Curtis are immune from damages on that portion of plaintiffs' section 1983 claim attacking the integrity of the investigation is consistent with its earlier holding. To immunize the act of petitioning the government, but not the government's response thereto, strikes this Court as anomalous particularly where, as here, the "sham" and "co-conspirator" exceptions to the *Noerr-Pennington* doctrine were held to be inapplicable.

of the "publicity" generated by defendants Pirochta and Curtis (in concert with others). Such publicity, these plaintiffs maintain, maligned an *entire* industry — *i.e.*, the transmission repair industry — though, in fact, only a *few* shops were found to have committed consumer fraud. As a result, with their business reputations so maligned, they allegedly suffered substantial economic losses. Assuming that the publicity deprived these plaintiffs of a protected liberty or property interest without due process of law, contrary to the command of the 14th Amendment, *see Wisconsin* v. *Constantineau*, 400 U.S. 433 (1973), the Court nonetheless finds, as a matter of law, that "any official could have . . . reasonably believed that his action was lawful." *Danese*, *supra*, at 1242.

Simply put, though the publicity may have "significantly altered [the plaintiffs'] status as a matter of state law", *see Paul* v. *Davis*, 424 U.S. 693, 704 (1976) (clarifying the underpinnings of *Constantineau*, *supra*), by adversely affecting their business which the State of Michigan licensed and regulated, there has been no showing by plaintiffs in response to defendants' motion that the statements made to the public singled out these particular plaintiffs. *See* Fed.R.Civ.P. 36(e) ("[w]hen a motion for summary judgment is made and supported . . ., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading"), cited in *Celotex Corp.* v. *Cattrett*, 477 U.S. 317 (1986). Accordingly, absent such identification, this Court is not prepared to hold (as would plaintiffs) that the public release of investigative findings regarding consumer fraud perpetrated by franchised transmission shops violates a clearly established right of which defendants Pirochta and Curtis should have known. Compare *Constantineau*, where the information disseminated identified the plaintiff by name. This Court cannot say that the unlawfulness of the "publicity" was apparent. Faithful to *Anderson*, *supra*, the Court is thus of the view

that the doctrine of qualified immunity extends to plaintiffs' publicity allegations (as distinct from the "rigged" investigation allegations) as well. That portion of plaintiffs' section 1983 claim predicated on such publicity allegations, then, are likewise subject to summary judgment.

Having dismissed the section 1983 claim, the Court will remand plaintiffs' state law claims against defendants Pirochta and Curtis. *See Carnegie-Mellon Univ.* v. *Cohill*, __U.S.__, 108 S.Ct. 614 (1988). In so doing, the Court declines defendants' invitation to retain jurisdiction over (and ultimately decide) such claims. See *Province* v. *Cleveland Press Pub. Co.*, 787 F.2d 1047 (6th Cir. 1987) where the court wrote: "Through a series of cases following [*United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966)], this circuit has adopted the position that the district courts have *minimal* discretion to decide pendent state law claims on the merits once the basis for federal jurisdiction is dismissed before trial." 787 F.2d at 1035 (emphasis added; citation omitted). The instant case — where discovery has not yet closed, where "substantial . . . time and resources" have not been expended, *ibid.*, and where state claims against the non-governmental defendants have already been remanded — presents no occasion to exercise the minimal discretion given this Court.

To conclude, the Court is of the view that defendants Pirochta and Curtis enjoy qualified immunity from damages. Regarding plaintiff's section 1983 claim, then, these defendants will be granted summary judgment. The state law claims against them will be remanded to the Wayne County Circuit Court. This disposition, the Court notes,

makes the motion for stay of discovery, filed by Pirochta and Curtis and also pending before this Court, moot.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: June 26, 1990

Copies mailed to:
Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee Schutzman, Esq., Thomas Gottschalk, Esq..

ORDER GRANTING DEFENDANTS SUMMARY JUDGMENT AS TO THE 42 U.S.C. § 1983 CLAIM AND REMANDING STATE LAW CLAIMS TO WAYNE COUNTY CIRCUIT COURT

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on June 26, 1990.

PRESENT: THE HONORABLE PATRICK J. DUGGAN,
U.S. DISTRICT COURT

For the reasons set forth in the Court's opinion issued this same date,

IT IS ORDERED that defendants Pirochta and Curtis' Motion for Summary Judgment as to plaintiffs' 42 U.S.C. § 1983 claim is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' state law claims against these defendants are REMANDED to Wayne County Circuit Court.

/s/ PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

DATED: June 26, 1990

Pursuant to Rule 77(d), Fed.R.Civ.P. copies mailed this date to the following parties:

Martin E. Crandall, Esq., Bruce Devlin, Esq., Mark R. Bendure, Esq., James J. Williams, Esq., Lee Schutzman, Esq., Thomas Gottschalk, Esq..

COMPLAINT AND JURY DEMAND

(State of Michigan – Circuit Court – County of Wayne)

(Dated July 18, 1989)

(AMERICAN TRANSMISSIONS, INC., AMERICAN TRANSMISSIONS LAND COMPANY, INC., JAY ENTERPRISES, INC., J, J & T INC., COMMERCIAL TRANSMISSIONS, INC., JOHN F FOLINO, JOYCE FOLINO, JOHN A. FOLINO, THOMAS A. FOLINO, MARIO BOSSIO, B & C CORP., INC., TRANS-4, INC., EMILIO DALOISIO, MARY DALOISIO, AND M & E CORPORATION, INC., Plaintiffs, -v- GENERAL MOTORS CORPORATION, a Delaware corporation, the STATE OF MICHIGAN, FREDERICK PIROCHTA, WALTER CURTIS, LUCILLE TREGANOWAN, TRANSMISSIONS BY LUCILLE, a Pennsylvania corporation, and FAIRFAX GROUP LIMITED, a Virginia corporation, Jointly and Severally, Defendants – 89-917691 NZ; JDG: HELENE N. WHITE)

There is now on file in this Court the following actions between some of these parties arising out of the same or similar transactions or occurrences as alleged in this Complaint:

> Administrative Appeal No. 89-910378AA, Appellants American Transmissions of Plymouth and of Garden City and of Ann Arbor, Meixner and Zarbaugh v. Appellees Michigan Department of State, Office of Secretary of State, and Bureau of Automotive Regulation
>
> and
>
> Consumer Protection Action No. 86-622774CP, 86-622775CP, 86-622825CP (consolidated), Frank J. Kelley v. Jay Enterprises, Commercial Transmissions, Inc., J, J & T, Inc.

These actions are pending and have been assigned to Judge Helene N. White.

/s/ Martin E. Crandall
/s/ Janice A. Kyko
/s/ Mark R. Bendure
/s/ James J. Williams

Plaintiffs American Transmissions, Inc., American Transmissions Land Company, Inc., Jay Enterprises, Inc., J, J & T, Inc., Commercial Transmissions, Inc., John F. Folino, Joyce Folino, John A. Folino, Thomas A. Folino, Mario Bossio, B & C Corp., Inc., Trans-4, Inc., Emilio Daloisio, Mary Daloisio and M & E Corp., by and through their attorneys, Martin E. Crandall, Janice A. Kyko, Mark R. Bendure and James J. Williams, for their Complaint state as follows:

PARTIES, VENUE AND JURISDICTION

1. Plaintiff American Transmissions, Inc., is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

2. Plaintiff American Transmissions Land Company, Inc., is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

3. Plaintiff Jay Enterprises, Inc., is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

4. Plaintiff J, J & T, Inc. is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

5. Plaintiff Commercial Transmissions, Inc. is a Michigan corporation, having its principal place of business in the City of Livonia, Wayne County, Michigan.

6. Plaintiff B & C Corp., Inc. is a Michigan corporation, having its principal place of business in the City of Royal Oak, Oakland County, Michigan.

7. Plaintiff Trans-4, Inc. is a Michigan corporation, having its principal place of business in the City of Farmington Hills, Oakland County, Michigan.

8. Plaintiff M & E Corporation is a Michigan corporation, having its principal place of business in the City of Dearborn Heights, Wayne County, Michigan.

9. Plaintiff John F. Folino resides in Wayne County, Michigan and is an officer and shareholder of Plaintiffs American Transmissions, Inc., American Transmissions Land Company, Inc., Jay Enterprises, Inc., J, J & T, Inc. and Commercial Transmissions, Inc.

10. Plaintiff Joyce Folino resides in Wayne County, Michigan and is an officer and shareholder of Plaintiff Jay Enterprises.

11. Plaintiff John A. Folino resides in Oakland County, Michigan and is an officer and shareholder of Plaintiff J, J & T, Inc.

12. Plaintiff Thomas A. Folino resides in Oakland County, Michigan and is an officer and shareholder of Plaintiff J, J & T, Inc.

13. Plaintiff Mario Bossio resides in Wayne County, Michigan and is an officer and shareholder of Plaintiffs B & C Corporation and Trans-4, Inc.

14. Plaintiff Emilio Daloisio resides in Wayne County, Michigan and is an officer and shareholder of Plaintiff M & E Corporation.

15. Plaintiff Mary Daloisio resides in Wayne County, Michigan and is an officer and shareholder of Plaintiff M & E Corporation.

PRIVATE DEFENDANTS

16. Defendant General Motors Corporation is a Delaware corporation, having a registered office and place

of business and conducts business in Wayne County, Michigan, with its office and principal place of business located at 3044 West Grand Boulevard in the City of Detroit, State of Michigan.

17. Defendant Fairfax Group Limited is a Virginia corporation, having a registered office at 5218 Ashcroft County, Fairfax, Virginia.

18. Defendant Transmissions by Lucille, Inc. is a Pennsylvania corporation with its corporate office at 49 Verona Road, Pittsburgh, Pennsylvania.

19. Defendant Lucille Treganowan resides in Pennsylvania and is an officer and owner of Defendant Transmissions by Lucille, Inc.

PUBLIC DEFENDANTS

20. Defendant State of Michigan, through its Bureau of Automotive Regulation and its Attorney General, during the times relevant to this Complaint, worked with, for and on behalf of General Motors Corporation.

21. Defendant Frederick Pirochta was at all times relevant the Director of Michigan's Bureau of Automotive Regulations.

22. Defendant Walter Curtis was a mechanic at all relevant times employed by Michigan's Bureau of Automotive Regulations.

23. The within causes of action arose out of the Defendants doing or causing acts to be done in Wayne County and other locations.

24. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($ 10,000.00) Dollars.

25. In approximately 1975, Defendant General Motors began manufacturing a defective transmission known as the

Turbohydromatic (THM) 200, which they installed in approximately 5 million vehicles.

GENERAL ALLEGATIONS

26. On or about November 15, 1982, the Federal Trade Commission and Defendant General Motors Corporation (hereinafter General Motors) entered into a Consent Order requiring General Motors to implement a nationwide third-party arbitration program to settle consumer complaints relating to, *inter alia*, General Motors transmissions.

27. The Better Business Bureau (hereinafter BBB) was used, pursuant to the Consent Order, to arbitrate the costs to be allocated between General Motors and consumers for defective transmissions which had to be repaired after November 15, 1982.

28. Resulting from the FTC Consent Order and the BBB arbitrations, was a substantial amount of bad publicity concerning General Motors' Turbohydromatic (THM) 200 transmissions which General Motors sought to avoid.

29. Between 1982 and 1985, Defendant General Motors had to pay approximately $40 million for the repairs of transmissions, pursuant to the FTC/BBB arbitration program.

30. Intentionally to circumvent the bad publicity and avoid BBB arbitrations, and intentionally to avoid their warranty requirements, Defendant General Motors decided to initiate a program to disparage chain transmission facilities, including the corporate Plaintiffs, which were repairing the faulty THM 200 General Motors transmissions and notifying consumers of their rights under the FTC Consent Order.

31. In approximately late 1985, Defendant General Motors agreed with Lucille Treganowan and Transmissions by Lucille, Inc. to attack various chain transmission facili-

ties which were performing the repairs on the aforementioned General Motors transmissions.

32. At dates and times uncertain in approximately late 1985 or early 1986, all Defendants illegally agreed and conspired to violate the civil rights of these Plaintiffs and others by attacking, intimidating and disparaging various chain transmission facilities in order for Defendant General Motors to avoid its aforementioned warranty obligations.

33. Defendant Fairfax Group, Ltd. was utilized with Lucille Treganowan and Transmissions by Lucille, Inc., to attack the chain transmission facilities.

34. At various times in February and March of 1986, Defendant General Motors, Defendant State of Michigan through its Bureau of Automotive Regulation officials and representatives, including Frederick Pirochta, met at various times and locations, including various meetings at the GM building in Detroit, Michigan, to coordinate ostensibly an investigation, actually an attack, upon the chain transmission facilities, including Plaintiffs named in this Complaint.

35. In or about April 1986, a meeting was held at the General Motors Tech Center in Warren, Michigan and present at said meeting was Fred Pirochta, the State's Bureau of Automotive Regulation Director, Janice B. Levine, Assistant Attorney General, various General Motors personnel and others, for the purpose of coordinating the attack upon Plaintiffs.

36. In approximately April of 1986, Walter Curtis, a mechanic employed by the State of Michigan's Bureau of Automotive Regulation, was trained by Defendant Lucille Treganowan at her place of business in Pittsburgh, Pennsylvania, Transmissions by Lucille, Inc.

37. In approximately April of 1986, Defendant General Motors Corporation and Defendant Fairfax developed var-

ious coercive cover stories to be utilized by Defendant State of Michigan investigators conducting the attack upon the chain transmission facilities, including Plaintiffs' facilities.

38. Decisions were made by various individuals employed by Defendants, including Lucille Treganowan, various State of Michigan officials, Michael Hirschman of Fairfax Group Limited and various General Motors Corporation officials to:

(a) Utilize graphite in the investigation;

(b) Not to flush cooler lines;

(c) To utilize the various coercive cover stories developed by General Motors Corporation and Fairfax Group, Limited;

(d) To utilize transmission pans containing debris;

(e) To utilize used transmission fluid in conducting these investigations; and

(f) To mislead mechanics into believing that the investigative transmissions were damaged and needed repairs.

39. Between June 11 and June 13, 1986, Walter Curtis and various employees of Lucille Treganowan's at her place of business in Pittsburgh, Pennsylvania, prepared numerous transmissions for use in the investigation.

40. Between June 11 and June 13, 1986, Lucille Treganowan and her business provided to the State of Michigan quantities of used transmission fluid, various dirty pans and quantities of graphite for use in the investigation.

41. On or about June 18, 1986, Lucille Treganowan, Janice B. Levine, Fred Pirochta, various General Motors personnel and others, had a meeting in Florida to discuss the investigation.

42. In June of 1986, employees of Transmissions by Lucille, Inc., performed labor and supplied transmissions and parts for various transmissions to be utilized in the State of Michigan/General Motors investigation.

43. Defendant Lucille Treganowan invoiced Defendant General Motors Corporation for the labor, parts and transmissions utilized in this investigation.

44. Defendant General Motors paid Defendant Lucille Treganowan for the labor, parts and transmissions utilized in this investigation.

45. In June and July 1986, after the transmission work was completed in Pittsburgh, the transmissions were delivered to Detroit, Michigan.

46. The investigation conducted by General Motors, the State of Michigan, Lucille Treganowan and Fairfax Group Limited, continued until August 6, 1986, at which time certifications and registrations of Plaintiffs Jay Enterprise, Inc., J, J & T, Inc., Commercial Transmissions, Inc., and others, were summarily suspended by Order of the Secretary of State of the State of Michigan.

47. Prior thereto, all corporate Plaintiffs were duly certified and registered pursuant to the Michigan Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*, MSA 9.1720(1).

48. On or about August 12, 1986, following the summary suspensions, a massive display of publicity and public statements were generated by the officials of the State of Michigan, in concert with the General Motors Corporation, intentionally directing the public to avoid use of chain transmission facilities, including Plaintiffs' facilities, and send their transmission business back to the General Motors dealerships, based upon the results of an investigation conducted by the Office of the Attorney General and the Bureau of Automotive Regulations.

49. The aforesaid acts of Defendants did not reasonably relate to the proper purposes, scope, activities and functions authorized by the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*

COUNT I
DENIAL OF DUE PROCESS

50. Plaintiffs adopt by reference paragraphs 1 through 49.

51. As a direct and proximate result of the aforesaid events, all Plaintiffs suffered a dramatic decrease in their businesses.

52. Pursuant to the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*, Plaintiffs had a property interest in their registration and certification to engage in the transmission repair business, subject to divestiture only after an adequate notice and a meaningful opportunity to be heard or after a finding of irreparable public harm requiring immediate action.

53. Plaintiffs had fundamental property interests in their right to conduct their businesses and their right to earn a living, subject only to such reasonable regulations, as were necessary for the public good.

54. Plaintiffs had a fundamental liberty interest in their good names, reputations, honor and integrity.

55. Plaintiffs' aforesaid property interests in their registration, certification and right to conduct business were subject to regulation and divestiture based only upon relevant considerations and supported by substantial evidence free of arbitrariness, capriciousness or unreasonableness.

56. Plaintiffs had rights pursuant to the Michigan Constitution 1963, Art. 1, § 17, and, under 42 U.S.C. § 1983, pursuant to the Fourteenth Amendment to the United States Constitution, not to be deprived of their aforesaid

property and liberty interests without substantive and procedural due process of law.

57. Defendants General Motors Corporation, Lucille Treganowan, Transmissions by Lucille and Fairfax, by their aforesaid acts and decisions, recklessly or intentionally, conspired with and/or acted jointly with the State of Michigan and its policymaking agents, under color of law and policy, to deprive Plaintiffs of their above-described substantive and procedural due process rights.

58. Plaintiffs directly and proximately suffered a deprivation of their above-described property and liberty interests without substantive or procedural due process as a result of the acts of all Defendants.

59. Pursuant to the Michigan Constitution 1963, Art. 1, § 17 and through 49 U.S.C. § 1983 pursuant to the Fourteenth Amendment of the United States Constitution, the private Defendants are accordingly liable to Plaintiffs for damages, and, pursuant to the Michigan Constitution 19673, Art. 1, § 17, the public Defendants are liable to Plaintiffs for damages, including:

(a) Loss of Plaintiffs' business, good will and reputation in the community;

(b) Damage to the reputations and good names of all Plaintiffs, both in the eyes of the community as business people and in the eyes of the members of the community, both personally and as honest businessmen;

(c) Deprivation of the licenses, certifications, and right of all Plaintiffs to conduct their business;

(d) Resulting economic loss to all Plaintiffs;

(e) Resulting non-economic, emotional distress, embarrassment, reputation damage and humiliation suffered by all individual Plaintiffs; and

(f) Punitive damages.

COUNT II
FRAUD

60. Plaintiffs hereby adopt by reference paragraphs 1 through 59.

61. All Defendants, by their aforesaid acts and decisions, recklessly or intentionally, represented that Plaintiffs committed unfair and deceptive practices, in violation of the Motor Vehicle Service and Repair Act.

62. That the aforesaid representations were false.

63. That when the private Defendants conspired with and acted jointly with the State of Michigan Defendants in making these false representations, Defendants knew that it was false or made the aforesaid representation recklessly and without any knowledge of its truth.

64. When Defendants conspired with and acted jointly with each other to make the aforesaid representations, Defendants acted with the intentions that Plaintiffs should rely and respond accordingly to the aforesaid false representations.

65. Plaintiffs did rely on the aforesaid representations and did then act in reliance upon said representations.

66. As a direct and proximate result of their reliance upon the aforesaid false representations, Plaintiffs suffered injury, including:

(a) Defending themselves against what Plaintiffs believed to be a legitimately motivated administrative proceeding and a legitimately motivated civil proceeding brought by the State of Michigan against Plaintiffs;

(b) Loss of Plaintiffs' business reputation;

(c) Economic loss to all Plaintiffs;

(d) Non-economic emotional pain and suffering by all individual Plaintiffs.

COUNT III
INJURIOUS FALSEHOOD

67. Plaintiffs adopt by reference paragraphs 1 through 66.

68. Private Defendants, by their aforesaid acts and decisions, recklessly or intentionally conspired with or acted jointly with the State of Michigan Defendants to cause to be published false statements affecting Plaintiffs.

69. Defendants intended the aforesaid false statements to result in harm to the pecuniary interests of Plaintiffs or, Defendants should have recognized that their aforesaid acts were likely to result in harm to the pecuniary interests of Plaintiffs.

70. Defendants knew that these statements were false or Defendants acted in reckless disregard of their truth or falsity.

71. As a direct and proximate result of Defendants' acts, Plaintiffs suffered pecuniary loss, including:

(a) Economic loss from the profits lost by their business; and

(b) Economic loss in the damages to Plaintiffs' business good will.

COUNT IV
TORTIOUS INTERFERENCE WITH
ADVANTAGEOUS BUSINESS RELATIONSHIP

72. Plaintiffs adopt by reference paragraphs 1 through 71.

73. Prior to the aforesaid acts of all Defendants, Plaintiffs possessed a valid business relationship or expectancy with potential customers in the marketplace for transmis-

sion repair work and with prior and then existing customers with whom they had established business relationships.

74. All Defendants knew or should have known of the aforesaid business relationships or expectancies.

75. All Defendants recklessly or intentionally conspired to intentionally interfere with the aforesaid business relationships or expectancies, which interference induced or caused the termination of said relationships or expectancies.

76. As a direct and proximate result of the acts of Defendants, Plaintiffs suffered damages, including:

(a) A disruption and termination of Plaintiffs' existing relationships with customers;

(b) A disruption and termination of expectancies and relationships with potential and future customers of Plaintiffs.

COUNT V
INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS

77. Plaintiffs adopt by reference paragraphs 1 through 76.

78. All Defendants conducted their aforesaid acts in an extreme and outrageous manner. As a direct and proximate result of the aforesaid extreme and outrageous conduct of all Defendants, the individual Plaintiffs suffered severe emotional distress and continue to suffer severe emotional distress to this date.

WHEREFORE, Plaintiffs pray that they be awarded damages, actual, special and exemplary, in whatever amount in excess of $10,000.00 that they may be found entitled to, plus their lawful fees and costs of pursuing this action.

JURY DEMAND

NOW COMES Plaintiffs, by and through their respective counsel, and hereby demand a trial by jury in the above-captioned matter.

Respectfully submitted,

By: /s/ Martin E. Crandall (P26824)

By: /s/ Janice A. Kyko (P33914)
650 First National Building
Detroit, MI 48226

By: /s/ Mark R. Bendure (P23490)
577 E. Larned, Suite 210
Detroit, MI 48226

By: /s/ James J. Williams (P26727)
1700 N. Woodward Ave., Ste. A
P. O. Box 587
Bloomfield Hills, MI 48013

Dated: 7-18-89

AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST*

(United States of America — Federal Trade Commission)

(Dated November 15, 1982)

(In the Matter of GENERAL MOTORS CORPORATION, a corporation – DOCKET NO. 9145)

The Agreement herein, by and between General Motors Corporation, a corporation, hereinafter sometimes referred to as respondent, by its duly authorized officer, and its attorneys, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent General Motors Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 West Grand Boulevard, in the City of Detroit, State of Michigan.

2. Respondent has been served with a copy of the Complaint issued by the Federal Trade Commission, charging it with violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1980), and has filed an answer to said Complaint denying said charges. General Motors denies the acts and practices alleged in paragraphs 5 through 10 of the Complaint, and continues to deny that such acts and practices violate Section 5 of the Federal Trade Commission Act.

3. Respondent admits all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondent waives:

(a) any further procedural steps;

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*[*Printer's Note*]: All attachments referred to in this Order have been omitted in this reproduction.

(b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

5. This Agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this Agreement is accepted by the Commission, it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Agreement and so notify the respondent, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This Agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the said copy of the Complaint issued by the Commission.

7. This Agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may, without further notice to respondent: (1) issue its decision containing the following Order to Cease and Desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the Order to Cease and Desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed-to Order to respondent's

address as stated in this Agreement shall constitute service. Respondent waives any right it may have to any other manner of service. The Complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the Order or the Agreement may be used to vary or contradict the terms of the order.

8. Respondent has read the Complaint and the Order contemplated hereby. It understands that once the Order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the Order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

ORDER

Definitions

For the purposes of this Order, the following definitions shall apply:

A. "General Motors" – General Motors Corporation, and its successors, assigns, officers, representatives, agents, and employees, acting directly or through any corporation, subsidiary, division, or other device.

B. "Vehicle" – A General Motors passenger car or light truck with a gross vehicle weight rating no greater than 10,000 pounds.

C. "Specified Components" – The following components manufactured through the date the Commission accepts this agreement pursuant to Section 3.25(f) of the Commission's Rules of Practice:

(1) THM 200 automatic transmissions;

(2) camshafts or lifters in 305 or 350 cubic-inch displacement ("CID") gasoline engines produced in

plants operated by General Motors Chevrolet Division since 1974;

(3) fuel injection pumps or fuel injectors in 350 CID diesel engines produced in plants operated by General Motors Oldsmobile Division.

D. "Dealer" – Any person, partnership, firm, or corporation which, pursuant to a Dealer Sales and Service Agreement with General Motors, purchases or receives on consignment from General Motors vehicles for resale or lease to the public, including partnerships, firms, or corporations owned or operated by General Motors.

E. "Product Service Publication" ("PSP" or "Bulletin") – A document or an article in a document issued from time to time by General Motors car or truck divisions to their dealers or to dealers' employees, which describes or recommends:

(1) diagnostic, repair, or maintenance procedures;

(2) additional parts or upgraded or different replacement parts;

(3) non-repair information regarding the use and care of vehicles.

Examples of PSPs are: "Dealer Service Technical Bulletins," "Dealer Technical Bulletins;" and some articles in "Service Guild," "Service News," and "Dealer Service Information Bulletins," depending on the practice of the division issuing the PSP. The term "PSPs" includes other documents bearing different titles, but which are substantially the same in content and purpose. If a document (such as "Service News" and "Service Guild") contains several articles, any one of which describes unrelated diagnostic, repair, or maintenance procedures, then each such article shall be

considered to be an individual PSP. PSPs do not include shop service manuals or parts manuals.

F. "Product Condition" – The condition of a vehicle that gives rise to any repair, maintenance, or diagnostic procedures, or that gives rise to the use of additional parts, described in PSPs.

G. "PSP Index" – A document, clear and comprehensible to prospective purchasers and vehicle owners, which has entries for all PSPs published each model year by the applicable General Motors car or truck divisions.

(1) For each entry in the PSP Index, the following information will be readily understandable:

(a) the particular model(s) and model year(s) to which the entry applies or potentially applies;

(b) the subject of the PSP;

(c) the major component or system of components to which the PSP relates;

(d) the identifying number of the PSP to which the entry relates; and

(e) how to obtain that PSP from General Motors and its dealers.

(2) The PSP Index shall contain PSP Explanatory Information, subject to the provisions of paragraph D(2) of section I, and the PSP Explanatory Information shall be appropriately referenced in the PSP Index entry, when any of the following criteria is met:

(a) the PSP describes repair, maintenance, or diagnostic procedures not previously specifically covered in the applicable shop service manual, either (i) where the cost of such

procedures to a customer is reasonably expected to exceed the reference cost, or (ii) where the procedures are intended and designed to prevent future repair or replacement costs reasonably expected to exceed the reference cost; or

(b) the PSP describes revisions to repair, maintenance, or diagnostic procedures in the existing shop service manual where the revisions are intended and designed either (i) to prevent future repair or replacement costs reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(c) the PSP describes modified (including additional, different, or upgraded) parts recommendations,where the modification is intended and designed either (i) to prevent future repair or replacement costs reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(d) the PSP describes (i) information revising or updating owner's manuals or maintenance schedules or (ii) non-repair information regarding the use and care of vehicles by vehicle owners and operators.

H. "PSP Explanatory Information" – Information related to a particular PSP, that includes all of the following items as applicable:

(1) a description of the product condition and the engine size and transmission type (automatic or manual);

(2) a description of the major symptoms indicating the product condition;

(3) the steps or possible steps that can be taken to minimize or avoid the product condition;

(4) a statement that upgraded or different parts are called for to correct the product condition, if such is the case; if no such parts are involved, a statement that the repair or maintenance procedure discussed in the PSP has to be repeated if such is the case;

(5) a statement of the immediate and long-range performance consequences; and if avoidance of repair costs is a reason for undertaking the procedure, a statement of the estimated repair costs if known, or, if not known, a characterization of the costs of not performing the procedures in a timely manner;

(6) where available, the estimated labor time and an estimated range of retail labor rates, as well as a list of the major parts required to correct the product condition;

(7) a description of the underlying PSP(s) sufficient to permit an interested person to identify and order the PSP(s) from General Motors; and

(8) a disclosure of the primary benefit(s) of this information, if the PSP contains information not related to a product condition, such as some PSPs meeting the criteria set forth in paragraph G(2)(d) of this Definition section.

Provided, however, that for PSPs relating to use and care information or to product conditions about which General Motors notifies all affected owners directly and in writing, the owner letter may be used in lieu of PSP Explanatory information.

I. "Costs" –

1. "Reference Cost" in paragraph G(2) of this Definition section means one hundred fifty dollars ($150), adjusted in the month when this Order is served and, annually thereafter, by a ratio, the numerator of which is the most recently published quarterly "Implicit Price Deflator" for the Gross National Product (IPD), and the denominator of which is the IPD for the last quarter of 1982, adjustments to be rounded to the nearest dollar. IPDs used in these annual adjustments shall have been computed using the same base year.

2. "Cost(s)" other than "reference cost" in paragraph G(2) of this Definition section shall be calculated by adding the suggested retail price for parts which are or may be required and the applicable national average dealer warranty labor rate charges multiplied by the time required to effectuate the repair, replacement, diagnosis or maintenance as determined by the labor time guide for the applicable General Motors division.

J. "Third-Party Arbitration Program" – The program by which General Motors, through an impartial third-party administrator, permits any individual vehicle owner in the United States to submit an unresolved complaint for resolution by mediation, and, if mediation efforts fail, by arbitration administered by the third-party administrator.

K. "Powertrain Components" –

(1) *Gasoline and diesel engines.* Cylinder blocks and heads, and all internal parts, including camshafts and lifters, manifolds, timing gears, timing gear chains or belts and covers, flywheels, harmonic balancers, valve covers, oil pans, oil pumps,

engine mounts, seals and gaskets, water pumps and fuel pumps, and diesel injection pumps; also, turbocharger housings and internal parts, turbocharger valves, seals and gaskets.

(2) *Transmissions.* Cases and all internal parts, torque converters, vacuum modulators, seals and gaskets, and transmission mounts; also, transfer cases and all internal parts, seals and gaskets.

L. "Background Statements" – Those statements included in the Special Implementing Provisions to the General Motors Zone Handbook For Third-Party Arbitration (Attachment B to this Order), titled "Background Statement THM 200 Transmissions," "Background Statement Diesel Fuel Injection Systems," and "Background Statement Camshafts and Lifters."

I

IT IS ORDERED that respondent General Motors, its successors, assigns, officers, representatives, agents, and employees, acting directly or through any corporation, subsidiary, division, or other device, (elsewhere in this order, "respondent" or "General Motors"), in connection with the advertising, offering for sale, sale, or distribution of any vehicle in or affecting commerce in the United States, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. By January 1984, or by the date of service of this Order, whichever is later, failing to prepare and issue PSP Indexes for the 1982 and 1983 model years, and thereafter failing to prepare and issue PSP Indexes for each model year.

B. Beginning with the 1984 model year, failing to disclose for each model year, in a clear and conspicuous

manner, in each vehicle owner manual (where it shall be itemized in the Table of Contents) published by General Motors for each of its vehicle lines:

(1) the following statement –

Updated Service Information You Can Obtain

(Division) regularly sends its dealers useful service bulletins about (Division) products. (Division) monitors products performance in the field. We then prepare bulletins for servicing our products better. Now, you can get these bulletins, too.

Bulletins cover various subjects. Some pertain to the proper use and case of your car (truck). Some describe costly repairs. Others describe inexpensive repairs which, if done timely, with the latest parts, may avoid future costly repairs. Some bulletins tell a mechanic how to repair a new or unexpected condition. Others describe a quicker way to fix your car (truck). They can help a mechanic service your car (truck) better.

Most bulletins apply to conditions affecting a small number of cars (trucks). Your (Division) dealer or a qualified mechanic may have to determine if a specific bulletin applies to your car (truck).

You can subscribe to all (Division) bulletins. This way you'll get them as they come out. You can wait a while and get an index to the bulletins. The index summarizes some of the more important bulletins. You can also get individual bulletins. However, you'll need the index to identify them.

(2) the above statement shall in addition provide at least the following information in clear and comprehensible language –

(a) concerning indexes –

(i) Indexes list each PSP, provide ordering information for individual PSPs, and are cumulatively updated quarterly for each model year.

(ii) Indexes contain plain-language highlights and summaries of PSPs describing costly repairs, designed to prevent costly repairs, or containing owner use and care information.

(iii) They are free for model years 1982-1985; if there is a charge thereafter, it shall be credited against any charge for PSPs ordered.

(iv) Most PSPs applicable to a new car will be listed in the last quarter's index for that car's model year. Some may also appear in indexes for the next model year; and a few may appear in subsequent years.

(v) When consumers order any index, they will receive the latest applicable index for the model year of their car unless they request an index for a different model year.

(b) concerning PSPs –

(i) The cost of individual PSPs, if any, and how to order them.

(c) concerning subscriptions –

(i) The cost of subscriptions and how to order them.

(ii) The subscriber is entitled to all PSPs published by a division during a model year.

(d) concerning ordering –

(i) An ordering coupon to obtain a properly identified index, PSP, or subscription.

(ii) The toll-free telephone number described in paragraph C of section II.

(iii) A statement that informs owners that they can inspect copies of the indexes and individual PSPs at a participating dealership.

(3) the following statement, which shall be made in conjunction with the statement described above, but which shall not precede disclosure of the information described in paragraphs B(2)(a)(i) and B(2)(a)(ii) –

These bulletins are meant for mechanics. They are NOT meant for the do-it-yourselfer. Mechanics have the equipment, tools, safety instructions, and know-how to do a job quickly and safely.

C. Beginning with the 1984 model year, failing to disclose, for each model year, in a clear and conspicuous manner in the principal point-of-sale catalog published by General Motors for each of its vehicle lines the following statement:

A Word About Updated Service Information

(Division) regularly sends its dealers useful service bulletins about (Division) products. (Division) monitors product performance in the field. We then prepare bulletins for servicing out products better. Now you can get these bulletins, too. Ask your dealer. To get ordering information, call toll-free _____.

D. Failing to mail, or cause to be mailed, upon written request accompanied by any applicable fee specified in section II, any of the following:

(1) information describing PSPs, PSP Indexes, and PSP subscriptions, as well as how to obtain each;

(2) the most current PSP Index for the particular General Motors vehicle division and model year identified in the request, provided that the PSP Explanatory Information in the PSP Index may be limited to the particular vehicle make, model and model year identified in the request; or

(3) in accordance with the terms of paragraph A of section II, any specifically identified PSPs, or a subscription to all PSPs for a current model year.

Provided that, General Motors need not make available a PSP or PSP Index issued in a model year four (4) or more years prior to the model year in which the request is received.

E. Failing to mail, or cause to be mailed, upon oral request received pursuant to a toll-free telephone procedure of the kind described in paragraph C of section II, information describing (1) PSPs, (2) PSP Indexes, and (3) PSP subscriptions, as well as ordering materials or coupons which can be used to order each.

F. Failing to furnish each dealer with each PSP and all PSP Indexes, and with binders, containers, index tabs, or other materials which enhance the accessibility of such materials at each dealership. General Motors need only furnish each dealer with the PSPs and PSP Indexes related to the vehicles manufactured by the division(s) represented by that dealership.

G. Beginning with the 1984 model year, and once in each 6-month period thereafter, failing to recommend and urge, in writing, that each dealer:

(1) place the display posters, referenced in paragraph B of section II, in conspicuous and accessible locations within the dealers' showrooms, service waiting areas, service payment areas or parts departments, and request replacement posters from General Motors, as needed;

(2) provide to requestors, in a form which may be retained, the PSP Index for a particular vehicle, make, model, end model year, and provide specifically identified PSPs and information how to order subscriptions to all PSPs for a particular model year, free or on reasonable terms; and

(3) provide members of the public with ready access to the PSPs and PSP Indexes furnished to those dealers.

H. Failing to include detailed information regarding General Motors third-party arbitration program described in section IV, and the PSP program described in this section, in ongoing training programs and training materials for dealers on subjects related to service and customer relations, beginning not later than one hundred eighty (180) days after service of this Order and continuing for the duration of this Order.

I. Failing to continue General Motors program of issuing PSPs in a manner comparable to the program as it existed during the period 1976 through 1981. Such program shall continue to take into account criteria for issuing PSPs such as frequency, repair, cost, and significance of product conditions.

J. Failing to prepare and issue an entry in the PSP Index for each PSP issued, and to include such entry in an

updated PSP Index. PSP Indexes must be cumulatively updated quarterly for each model year, and must include no less than all PSP Index entries for all PSPs issued between the start of the model year and one month prior to the update, provided that there must be one PSP Index for each model year that includes an entry for every PSP issued in that model year. The updated PSP Indexes must be forwarded to dealers and be available from General Motors within four months after issuance to dealers of any PSP which was not included in a prior Index.

II

IT IS FURTHER ORDERED that:

A. Beginning with the 1984 model year, General Motors shall implement a program whereby each person may obtain specified PSP Indexes, individual PSPs, or yearly subscriptions to all PSPs issued for a particular General Motors division in a model year. Subject to the limitations of this section, General Motors may, at its option, impose a reasonable charge. Any charge for a PSP Index must be credited toward the initial purchase of PSPs themselves. The maximum charges shall be as follows:

(1) For PSP Indexes ordered in

(a) model years prior to 1986, no charge;

(b) model years 1986 through 1988, a charge not to exceed two dollars ($2.00) per any PSP Index;

(c) model years 1989 and thereafter, a charge not to exceed three dollars ($3.00) per any PSP Index.

(2) For individual PSPs ordered in

(a) model years prior to 1986, a charge not to exceed three dollars ($3.00) for the first PSP requested in each order and one dollar ($1.00) for each additional PSP requested in that order;

(b) model years 1986 and thereafter, a charge not to exceed four dollars ($4.00) for the first PSP requested in each order and two dollars ($2.00) for each additional PSP requested in that order.

(3) For PSP subscriptions for a given model year, a charge not to exceed reasonable cost or equal to the charge (if any) to dealers.

B. In the 1984 model year, General Motors shall furnish to each of its dealers three display posters at least 24" × 36" in size promoting the existence, availability, and benefits of General Motors PSPs and PSP Indexes. Thereafter, General Motors shall furnish additional copies of these posters upon request by any dealer.

C. Within thirty (30) days after the date of service of this Order, General Motors shall establish and maintain a toll-free telephone system designed to accommodate the volume of telephone calls which result from the disclosures made pursuant to this Order. Said system shall provide that, after obtaining the caller's name and address, the person receiving the call shall cause to be mailed to the caller the materials described in paragraph E of section I or paragraph E of section IV as appropriate. If the materials described in paragraph E of section I are to be sent, General Motors shall instruct the person receiving the call to state that the caller's dealer may have PSPs and PSP Indexes available for the caller's convenience.

III

IT IS FURTHER ORDERED that:

A. At least four (4) times in the 1984 model year and two (2) times in each model year thereafter, General Motors shall place and cause to be disseminated four-color, full-page advertisements in national magazines. Each time such advertisements are placed, the magazines must have a combined total non-duplicated readership (i.e., "net reach") of at least seventy-five million (75,000,000) adults, as measured or verified by an outside organization generally recognized as competent and experienced in this field and used by General Motors or its advertising agencies for other advertising research. The demographic characteristics for the combined readership of the magazines selected for such advertisements must be generally representative of the demographic characteristics of the population of owners and potential purchasers of General Motors vehicles. Such advertisements may be tied into existing advertising themes, but must be devoted exclusively to explaining and promoting the existence, availability and benefits of PSPs and PSP Indexes. In addition, such advertisements must disclose that PSP Indexes are free, if such is the case; must prominently show the toll-free telephone number required by paragraph C of section II; and must include an order form to obtain PSP Indexes.

B. At least two (2) times in the 1984 model year, two (2) times in the 1985 model year, and three (3) times in each model year thereafter, General Motors shall place and cause to be disseminated full-page advertisements in national magazines. Each time such advertisements are placed, the magazines must have a combined total non-duplicated readership (i.e., "net reach") of at least seventy-five million (75,000,000) adults as measured or

verified by an outside organization generally recognized as competent and experienced in this field and used by General Motors or its advertising agencies for other advertising research. The demographic characteristics for the combined total readership of the magazines selected for such advertisements must be generally representative of the demographic characteristics of the population of owners and potential purchasers of General Motors vehicles. Such advertisements must contain a principal message devoted to explaining and promoting the existence, availability, and benefits of General Motors third-party arbitration program provided for in sections IV and V, and must conspicuously disclose the toll-free number required by paragraph C of section II. Each advertisement placed after the date of execution of this Order and before the date of service of this Order, if such advertisements meet all the requirements of this paragraph but for the fact that the advertisements were placed prior to the date of service of this Order, shall reduce on a one-for-one basis the requirement to place advertisements during the last three (3) years of the duration of this Order.

C. (1) Prior to the placement of the first advertisement required by paragraph A, and prior to the placement of any subsequent advertisements differing substantially in content or format from that first advertisement, General Motors shall conduct copy testing of such advertisement(s). The copy testing shall be based on monadic interviews (such as the "mall intercept" procedure) of subjects screened and selected so as to be representative of owners of General Motors vehicles purchased new, and shall be designed and implemented in accordance with General Motors usual procedures for such testing under the direction of an outside research organization

or consultant generally recognized as competent and experienced in this field and used by General Motors for other advertising research. Said organization or consultant shall submit to General Motors a report on the effectiveness of the tested advertisement, and said advertisement shall meet General Motors obligations under this section if said report concludes that the advertisement, measured in relation to advertisements for comparable automotive product information, effectively communicates:

(a) that General Motors makes information available to consumers, for 1982 and subsequent model years, which describes or recommends diagnostic, repair, or maintenance procedures for product conditions, or contains information about the use and care of vehicles; and

(b) how consumers can obtain PSP subscriptions and PSP Indexes.

Unless otherwise specified by this Order, the testing of advertisements described in this paragraph shall adhere to the standards set forth in "PACT: Positioning Advertising Copy Testing (A Consensus Credo representing the views of leading American Advertising Agencies)," dated January 1982.

(2) Prior to the placement of the first advertisement required by paragraph (B), and prior to the placement of any subsequent advertisements differing substantially in content from that first advertisement, General Motors shall conduct, or cause to be conducted, copy testing of said advertisement(s) using a population representative of

owners and potential purchasers of General Motors vehicles, and employing a so-called "Group-Depth Interview" or "Focus Group" method of copy testing, designed and implemented in accordance with General Motors usual procedures for such research under the direction of an outside research organization or consultant generally recognized as competent and experienced in this field and used by General Motors for other advertising research. Said organization or consultant shall submit to General Motors a report on the effectiveness of the tested advertisement(s), and the advertisement(s) shall meet General Motors obligations under this paragraph if, on the basis of said report and applying criteria customarily applied to General Motors service advertising or advertising for comparable complaint resolution programs, the advertisement(s) effectively communicates:

(a) that General Motors is offering to submit complaints concerning its vehicles to a third-party arbiter; and

(b) how consumers can obtain information about the third-party arbitration program.

D. Beginning with the 1984 model year, in any proprietary magazine sent by General Motors vehicle divisions to a primary target audience of division vehicle owners, General Motors shall annually include a full-page advertisement containing the disclosure statements set forth in paragraph B of section I, or the substantial equivalents thereof, concerning the same information.

IV

IT IS FURTHER ORDERED that:

A. General Motors shall implement a nationwide third-party arbitration program to settle complaints of individual owners relating to powertrain components.

B. Such third-party arbitration program shall be binding on General Motors, but non-binding on consumers unless a consumer elects to accept an arbitration award.

C. Such third-party arbitration program shall be conducted in accordance with (1) the Uniform Rules for Arbitration published by the Better Business Bureau; (2) the Zone Handbook for Third-Party Arbitration (Attachment A to this Order), as modified by the special implementing provisions (Attachment B to this Order); and (3) the General Motors Consumer Arbitration Handbook (Attachment C to this Order). The special implementing provisions (Attachment B to this Order) shall not be modified without prior Commission approval insofar as the provisions apply to arbitration involving specified components. For two years after the date of service of this Order, such third-party arbitration program shall be conducted at no charge to the consumer by General Motors or the third-party arbitrator. Thereafter, no charge shall be imposed on consumers by General Motors or the third-party arbitrator that exceeds charges specified in the Uniform Rules of Arbitration published by the Better Business Bureau. The General Motors Consumer Arbitration Handbook (Attachment C to this Order) shall effectively communicate that if a consumer accepts an arbitration award, the consumer cannot seek reimbursement from General Motors for the same problem through the use of other legal proceedings.

D. Such third-party arbitration program shall be fully operational in the cities identified in Attachment D no later than sixty (60) days after the date of service of this Order, and thereafter expanded as demands on

the program may require to resolve consumer complaints expeditiously. The expansion shall be designed and implemented so that owners who elect to arbitrate complaints about specified components can obtain their arbitration hearing within sixty (60) days of their election (exclusive of periods of delay attributable to the consumer) unless extraordinary circumstances justify a longer period in individual instances.

E. General Motors shall mail or cause to be mailed, either upon written request or oral request received pursuant to a toll-free telephone procedure of the kind described in paragraph C of section II, a handbook explaining the details of General Motors third-party arbitration program (Attachment C to this Order).

F. General Motors shall include in a letter to each dealer, once in each 6-month period, a clear and conspicuous reminder to dealers regarding disclosure of the availability of General Motors third-party arbitration program.

V

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date of service of this Order, General Motors shall contact, by first-class mail, each attorney general's office (or such other office as may be appropriate) of the fifty states and the District of Columbia, and shall:

(1) Provide each such office with a copy of this Order.

(2) Describe General Motors third-party arbitration program.

(3) Describe the PSPs and PSP Indexes and how consumers can obtain them.

(4) Inform each such office that General Motors will, if the appropriate office wishes, notify by first-class mail each person who has complained to that office about a specified component, and that General Motors will provide that person with:

(a) information about the availability of General Motors third-party arbitration program;

(b) one or more of the appropriate Background Statements when any specified component has been identified; and

(c) information about PSPs and PSP Indexes and how to obtain them.

(5) Request that each such office provide General Motors with (a) a copy of each complaint concerning a specified component; or, at the option of that office, (b) the owner's name and address, and the identity of the specified component or components.

(6) Inform each such office that General Motors will also send, by first-class mail, a notice to any person who has complained to any other state or local law enforcement or consumer affairs office about a specified component, and urge such office to encourage state and local law enforcement or consumer affairs offices to forward to General Motors either copies of such complaints, or, at the option of the forwarding office, a list of the names, addresses, and the identity of the specified component or components;

B. Within sixty (60) days after receipt of any complaint or the complainant's name and address, from any office solicited pursuant to paragraph A of section V, or any complaint concerning a specified component or the

complainant's name and address from the Federal Trade Commission, General Motors shall send to that complainant, by first-class mail:

(1) one or more of the appropriate Background Statements when any specified component has been identified;

(2) a statement which clearly and conspicuously discloses information about the availability of General Motors third-party arbitration program, including the statements contained in Attachment E;

(3) a statement which clearly and conspicuously discloses information about the availability of PSPs and PSP Indexes.

C. Within sixty (60) days after the date of service of this Order, General Motors shall send by first-class mail to any person who has an open or unsatisfactorily resolved complaint and who, prior to the date of service of this Order, had notified General Motors about a specified component, and whose name and address have been retained by General Motors, the information contained in paragraphs B(1), (2), and (3) above.

D. Within thirty (30) days of service of this Order, General Motors shall provide to appropriate General Motors employees, including employees at the zone offices and headquarters of the car and truck divisions who have responsibility for receiving and responding to consumer complaints, written instruction stating that all consumers who identify a specified component in any oral or written complaint received after the date of service of this Order must be sent, by first-class mail, a letter providing the information contained in paragraphs B(1), (2), and (3) above.

E. General Motors shall obtain, maintain, and retain for a period of four (4) years from the date of service of this Order, the following records for specified documents:

(1) the results of each mediation pursuant to the procedure described in section IV including the terms of any settlement and, where available, the terms of any proposed settlement of a complaint;

(2) copies of each arbitration decision, including, where available, the reasons for the decision; and

(3) documents showing all requests for arbitration made by vehicle owners, the dates of such requests, and the dates of all arbitration hearings.

VI

IT IS FURTHER ORDERED that sections I, II, III, IV and V of this Order shall expire eight (8) years after the date of service of this Order; *provided*, that if at any time during which said sections remain in effect, the Commission issues a final trade regulation rule imposing obligations on the automobile industry comparable to those imposed under any such section(s), such section(s) shall terminate upon the effective date of such rule, and, in such event, General Motors shall advise the Commission of its intention to rely upon any such rule as having terminated and superseded such section(s) of this Order thirty (30) days in advance of reliance thereon; *provided further*, that if at any time during which such section(s) remain in effect, the Commission issues a final guide under Sections 1.5 and 1.6 of the Commission's Rules of Practice imposing obligations on the automobile industry comparable to those imposed under any such section(s), then the Commission shall, upon General Motors motion or upon the Commission's own motion, re-open this proceeding within one hundred twenty (120) days of such motion, and, within a reasonable time thereafter, vacate

any such section(s) of this Order, unless the Commission finds that such action is not required by changed conditions of law or fact or is not in the public interest; and *provided further*, that nothing herein shall preclude General Motors at any time from moving the Commission to alter, modify, or set aside this Order under the Commission's Rules of Practice.

VII

IT IS FURTHER ORDERED that:

A. General Motors shall, within sixty (60) days after the date of service of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

B. General Motors shall, within one hundred twenty (120) days after the implementation of the PSP program pursuant to section I of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which General Motors has complied with this Order.

C. During the time that sections I, II, III, IV and V remain in effect, General Motors shall retain and transmit to the Commission upon reasonable request:

(1) a copy of each PSP Index required by paragraphs A and J of section I, and a copy of each PSP;

(2) copy-test results of advertisements disseminated pursuant to section III; and

(3) a copy of each poster furnished to dealers pursuant to paragraph B of section II.

D. Once during the term of this Order, General Motors shall file with the Commission a report, in writing, setting forth in good faith its best estimates of:

(1) the costs and benefits, to General Motors and to the public, of the obligations imposed by this Order; and

(2) the extent to which dealers have displayed posters furnished to them pursuant to paragraph B of section II and have provided access to PSPs and PSP Indexes furnished by General Motors as required by paragraphs A and J of section I.

Said report shall be filed within six (6) months of General Motors receipt of a request therefor from the Commission or its staff, and shall cover the period from the date of service of this Order until the date of said request. General Motors shall make available for inspection on reasonable notice by authorized representatives of the Federal Trade Commission, all underlying documents and data relating to the "cost and benefits" portion of said report and used in the preparation of said report. If copies of any such materials are requested by Commission representatives, General Motors may, at its option, either make such materials available to such representatives for copying purposes, or provide copies at either (a) rates the Commission charges for copies of materials released pursuant to the Freedom of Information Act, or (b) General Motors costs, whichever is lower.

E. General Motors shall retain records relative to the manner and form of its continuing compliance with sections I, II, III, IV and V for a period of three (3) years, and make said records available for inspection upon reasonable notice by authorized representatives of the Federal Trade Commission. If copies of any such records are requested by such representatives, General Motors may, at its option, either make such records available for copying purposes or provide copies at either (a) rates the Commission charges for copies

of records released pursuant to the Freedom of Information Act, or (b) General Motors costs, whichever is lower.

F. During the time that sections I, II, III, IV and V remain in effect, General Motors shall notify the Commission prior to any change in General Motors corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

VIII

IT IS FURTHER ORDERED that the provisions of this Order shall be limited in their application to the United States.

Signed this 15th day of November, 1982.

GENERAL MOTORS CORPORATION,
a corporation.
By: /s/ K. Potts,
Vice President-Group Executive
3044 West Grand Boulevard
Detroit, Michigan 48202

ATTORNEYS FOR GENERAL MOTORS:
By: /s/ OTIS M. SMITH,
Vice President-General Counsel
/s/ THOMAS B. LEARY
/s/ FRANCIS H. DUNNE
/s/ DAVID A. COLLINS

COUNSEL FOR FEDERAL TRADE COMMISSION:
By: /s/ WILLIAM W. JACOBS,
Assistant Regional Director
/s/ JOHN M. MENDENHALL,
Attorney

By: /s/ RICHARD H. GATELEY,
Attorney
/s/ BRENDA W. DOUBRAVA,
Attorney
/s/ ROBERT P. WEAVER,
Attorney
/s/ WILLIE L. GREENE,
Consumer Protection Specialist
/s/ NOBLE JONES,
Consumer Protection Specialist
/s/ DAVID V. PLOTTNER,
Consumer Protection Specialist

APPROVED:
By: /s/ BARBARA E. ARNOLD,
Acting Director,
Cleveland Regional Office
/s/ TIMOTHY J. MURIS,
Director,
Bureau of Consumer Protection

MICHIGAN D.O.S. INTERNAL MEMORANDUM

(Michigan Department of State – Lansing, Michigan 48918 – Richard H. Austin, Secretary of State)

(Dated March 14, 1986)

MEMORANDUM

DATE: March 14, 1986
TO: Marv Goldstein
FROM: Fred Pirochta
SUBJECT: PROPOSED INVESTIGATION OF TRANSMISSION SHOPS WITH THE COOPERATION OF GENERAL MOTORS

On February 7, 1986 I was invited to speak to the Owner Relation Managers of the various General Motors Divisions concerning the problems we were experiencing in connection with transmission repairs. At about the same time Jan Levine contacted General Motors Legal Counsel regarding the possibility of having two GM service representatives testify at an administrative hearing involving the performance of unnecessary transmission repairs.

Based upon these two contacts, attorneys for General Motors requested a meeting be held to discuss in more detail the issue of unnecessary transmission repairs.

On February 18th a meeting was held with the attorneys from General Motors. Web Buell and I represented the Department and Fred Hoffecker, Jan Levine, Bob Ianni and John Walters represented the Attorney General's Office.

We were informed that GM had initiated a number of investigations in other states in regard to a Federal Trade Commission Consent Agreement that they had entered into involving, among other things, transmission repairs. They stated their investigations were prompted by evidence that suggested vehicle mileage was being altered on docu-

ments to cause General Motors, under the FTC agreement, to pay for the repairs performed.

While the investigations started out looking only at the issue of altered mileage, it quickly became apparent that GM was paying for repairs that were unnecessary and/or for repairs which had doubled in price merely because General Motors would be paying some portion of the bill.

As a result of these findings and our apparent interest in dealing with unnecessary transmission repairs, we were asked if we would be willing to join forces and conduct a number of investigations in Michigan. The attorneys for General Motors stated they had vehicles, transmissions and manpower they would be willing to dedicate to the cause.

At this point, we informed the attorneys that we were very much interested in pursuing the matter and would be willing to take administrative and possibly criminal action if violations of the law were found but wanted an opportunity to obtain approval before moving ahead.

The attorneys for GM did ask that this matter be treated as confidential to avoid publicity which could compromise investigations in other states.

Having obtained approval to proceed with the project, a second meeting was held on March 5th. The purpose of this meeting was to discuss in detail the particulars of the project.

Pending Department approval the following agreements were reached:

General Motors would provide:

(1) vehicles (4) for investigative use

(2) rebuilt and documented transmissions (20)

(3) use of a technical facility for preparation of the vehicles

(4) a service engineer to help prepare the vehicles

The Attorney General's Office would provide two persons to conduct a portion of the investigations.

The B.A.R. would provide:

(1) money to pay for recommended repairs (approximately $15,000)

(2) technical assistance to prepare and document the vehicles (Walt Curtis)

(3) additional persons (as needed) to conduct investigations

And it was agreed that B.A.R. and the Attorney General's Office would choose 10 facilities to be investigated.

Once again, the meeting was adjourned for the purpose of obtaining approval to proceed.

FP:dh

HEADQUARTERS DOCUMENTS

Investigator: Dorothy Sabchek
Facility Contact: American Transmission
307 Startweather
Plymouth, MI 48170 313-455-3334
Pick-Up and Return Point: Secretary of State Office
Ask for Stan Perich
5819 E. 13 Mile
Warren, MI 48092
(313) 979-1580

Car: 19__ _____
License Plates: Pennsylvania
Phone Numbers: "headquarters"
(call to report in or for help): 974-1424
Jan Levine: 517-373-1668; 373-9398

Your Address: choose a street and number you will remember; area code: 215 Philadelphia, PA 19090

Appropriate Props in Car: maps in glove box, including Michigan map and Ann Arbor/Plymouth local map; coffee cup; pop can; newspaper/magazines; any other personal items

Cover Story:

You are in Plymouth visiting your parents. You aren't familiar with the area, since you have never lived in Plymouth. Your parents' address should be chosen by you as follows: Before you arrive at the facility, drive around the Plymouth area. Choose a neighborhood that looks expensive, and choose a street name and number that you will remember. Give this address as your parents' address, if necessary. You can have the address in your purse, if needed, since you don't remember it very well. The correct zip code for Plymouth is 48170; the correct telephone prefix is 455.

You've been visiting your parents for about two weeks, and you are almost ready to drive back home to Phila.. Your father has told you to check your transmission oil before you drive back home. You have not noticed anything wrong with the car, but your father has insisted that you have it checked out. If asked, you don't know much about the repair history of the car. You bought it used, and you've just had your local gas station in Phila. change your oil and take care of the car for you. You really don't know much about cars . . . You are planning to leave for Phila. the beginning of next week.

You want the transmission oil checked and any necessary repairs done. If a large amount of money is needed, you'll have it available even if you have to borrow from your parents for the trip home.

If you have to leave the car for a few hours, call _____ to ask your parents, brother, or sister for a ride. You will be picked up. Before leaving the facility, tell them that you need to attend a family gathering for the afternoon, and that you will not be available for the shop to call you; you'll call the shop to check on the car's progress.

If you need to leave the car overnight, it is all right. Your mother or brother or sister can bring you back to the shop tomorrow to get the car. You will be given a ride back to Lansing, and a ride back to Plymouth the next day.

You should dress like an upper-middle-class professional or business person (YUPPIE). You should have an air of authority about yourself, but just not know much about cars. (You want to give the appearance of being able to pay for the repair, and of being willing to spend up to $1,000 on your car.) You can dress casually, since you are on vacation. Wear expensive-looking jewelry, clothes, etc.

If the facility performs repairs, when you pick up the car, ask to have the parts back. Your request can seem natural if you say your father loaned you the money for the repairs, and he said to get the parts back. You can act somewhat intimidated by your father.

After you are out of sight of the facility, call 974-1424 to tell *Becky that the car is on the way in. Someone will meet you at the Warren office. You cannot leave the car until you sign the car back in at the Warren office.

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* The 974-1424 number is in Detroit. Instead, you can call _____ or Jan Levine in Lansing at 517-373-1668; 373-9398; 335-0855. You *must* let us know that the car is on the way in, so we can have someone meet you to sign the car back in.

Investigator: George Howard
Facility Contact: American Transmission
31749 Ford Road
Garden City, MI 48135 535-9700
Pick-Up and Return Point: Secretary of State Office
Ask for Stan Perich
5819 E. 13 Mile
Warren, MI 48092
(313) 979-1580
Car: 19__ _____
License Plates: Pennsylvania
Phone Numbers: "headquarters"
(to report in or for help): 974-1424
Jan Levine: 517-1668; 373-9398

Your Address: choose a street and number that you'll remember easily; phone area code: 215
Philadelphia, PA 19070

Appropriate Props in Car: several maps in glove box of Penn., Ohio, Michigan, New Jersey, etc; Detroit-area map in

glove compartment; matches in car; cigarette butts in ashtray; coffee cup; McDonald's napkins in glove box; pop can, etc.

Cover Story:

You are a pharmaceutical salesman, in the area for a week-long convention. (One of those things where everybody displays their product; like a trade fair.) The convention is at the Sheraton Motor Inn at the airport, 8600 Merriman Road, Romulus, phone 728-7900.

Normally, you are almost always on the road, selling your products to physicians and hospitals. You cover Pennsylvania, Delaware, New Jersey, and Maryland. You should choose a company name that you'll remember easily.

The convention is national. Today there is nothing on the agenda, so it was convenient for you to have the car checked out. You're due to leave the area on Friday afternoon. You brought the car to this shop because it was the only one that could get your car in to fit your schedule. Nothing is wrong; it just seemed like a good idea to get it checked out.

This afternoon you're going to Windsor with some of the guys, so you cannot be reached. If you have to leave the car for a few hours, say that you'll catch a cab either back to the Sheraton or downtown to meet your friends. Call a cab, and take it until you are out of sight. Then stop at a coffee shop or something similar, and call 974-1424, for a ride or further directions.

If you need to wait several hours for the car, you will be on your own for that time. You can wait in a restaurant, mall, etc. Try to stay where someone from the facility won't see you.

If the facility wants to keep the car overnight, it's no problem. You can pick the car up in the morning. If you need a ride back to Lansing for the day, call 974-1424 to

arrange that ride. Or, if you prefer, you can stay in Detroit overnight (at your own expense).*

If you are asked, you don't know anything about the mechanical history of the car. It was recently assigned to you after you turned in your former car. Your new car is ordered, but it hasn't come in yet. Your company maintains all the cars, and it will reimburse you for any maintenance or repair of this car.

Before you arrive at the facility, drive by the motel, and from there drive to the facility. Be able to talk, if necessary, about the traffic between the hotel and the facility.

If the facility performs repairs, when you pick up the car, ask to have the parts back. Your request can seem natural if you say that you have to return the parts before you can get reimbursed for the repair — it's your company's policy.

After you are out of sight of the facility, call 974-1424 to tell *Becky that the car is on the way in. Someone will meet you at the Warren office. You cannot leave the car until you sign the car back in at the Warren office.

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* If you decide to spend the night in Detroit, call 974-1424 to let us know that we don't have to get you back to Lansing, and so we can arrange to get you the next day.

* Either Becky, Fred Pirochta, Jan Levine, or Fred Hoffecker will be at the 974-1424 number.

Investigator: Skip Dunkle
Facility Contact: American Transmission
307 Starkweather
Plymouth, MI 48170 455-3334
Pick-Up and Return Point: Secretary of State Office
Ask for Stan Perich
5819 E. 13 Mile

Warren, MI 48092
(313) 979-1580

Car: 19__ _____

License Plates: Michigan

Phone Numbers: "headquarters"
(to report or to get help): 974-1424
CP legal division: 517-335-0855; 373-9398
Your office phone: 974-1424
(can be left with shop)

Your Address: choose a street number and name that you will remember; home phone: 455-
Plymouth, 48170

Appropriate Props in Car: cigarette butts in ashtray; coffee cup; newspaper, etc.

Cover Story:

You are an upper-middle-class businessman (YUPPIE). Dress and look affluent (ie, able to shell out $1,000 if needed).

You are buying the car for your wife. The seller has agreed to deduct the cost of any needed repairs from the price of the car. You want the car checked out and anything needed to be done. If necessary, you can telephone the seller to authorize any repair and the amount that he'll deduct from the price of the car. You will pay for the repair yourself.

You have not noticed anything wrong with the transmission; you've test-driven the car twice, including today coming into the shop.

You're on your way to work. If the car is going to be a long time, call your wife or a co-worker to pick you up and take you to work. (Call 974-1424)

You can leave your "private line" number at work if the shop needs to call you. Leave 974-1424. You'll be in and out all day, so a message can be left with your secretary.

Before you arrive at the shop, drive around and find a nice residential area, and choose a street name and number for your home address (one that you'll remember). Be able to talk, if necessary, about the traffic between your house and the repair shop.

If you need to leave the car for a period of time, someone will pick you up (your wife, secretary, or co-worker). You will be taken to a location to wait until the car is done.

If the facility performs repairs, when you pick up the car, ask to have the parts back. Your request can seem natural if you say that you need them to show the seller of the car, so you can deduct the cost of the repairs from the price of the car.

After you are out of sight of the facility, call 974-1424 to tell *Becky that the car is on the way in. Someone will meet you at the Warren office. You cannot leave the car until you sign the car back in at the Warren office.

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* Appointment be early in day or at lunch-time.

** If you cannot time this to be on your way to work in the morning, time it to drop the car off during lunch, instead.

* Either Becky, Fred Pirochta, Jan Levine, or Fred Hoffecker will be at 974-1424.

MICHIGAN COURT OF APPEALS OPINION, *PEOPLE v JAY ENTERPRISES, INC.*

(State of Michigan — Court of Appeals)

(Dated May 9, 1991)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JAY ENTERPRISES, INC., Defendant-Appellant, and MICHAEL RUTHERFORD, Defendant – No. 105861)

Before: Danhof, C.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant-appellant Jay Enterprises, Inc., and defendant Michael Rutherford were convicted as charged of attempting to obtain money under false pretenses over $100 in violation of MCL 750.92; MSA 28.287. Defendant Jay Enterprises, the only party to this appeal, was sentenced to three days probation, a $500 fine, and restitution in the amount of $783. Defendant Jay Enterprises appeals as of right, raising several issues. We reverse.

At the close of the prosecution's proofs, defendant moved for a directed verdict. The motion was denied. Defendant now claims that there was insufficient evidence of fraudulent conduct regarding the corporation to allow the charge to go to the jury. We agree.

On appeal, defendant raises an argument in support of his claim that the evidence was insufficient which was not raised in the motion for directed verdict. However, we will review the issue because failure to do so would result in manifest injustice. *Napier* v *Jacobs*, 429 Mich 222, 233; 414 NW2d 862, reh den 429 Mich 1213 (1987). On appeal, we review the evidence in a light most favorable to the prosecution in determining whether the evidence was sufficient to support the conviction. *People* v *Hamilton*, 407 Mich

354, 368; 285 NW2d 284 (1979), reh den 407 Mich 1164, cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980); *People* v *Strunk*, 184 Mich App 310, 326-327; 457 NW2d 149 (1990).

Defendant Jay Enterprises, Inc., is a Michigan corporation doing business as American Transmission in Garden City. Defendant Rutherford was a salesman for American Transmission at its Garden City facility.

The incident giving rise to the instant conviction arose when Rebecca Treber, an investigator for the Consumer Protection Division of the Michigan Attorney General's office, took a 1983 Chevrolet Monte Carlo to American Transmission. The Monte Carlo was supplied by Fred Pirochta, Director of the Bureau of Automotive Regulation for the State of Michigan, who informed Treber that the car's transmission was in perfect working condition. The transmission was examined and repaired and new parts were installed and marked for later identification by investigator Philip Hatt prior to the time Treber took possession of the car. The car operated well during the 90 mile drive from Lansing to Garden City.

Rutherford took the Monte Carlo for a four-block road test before placing it on a hoist to be examined by a mechanic. Rutherford showed Treber what he called an "excessive amount" of ground-up metal in the transmission pan and recommended a transmission "tear-down" so the mechanic could diagnose what repairs were necessary. Treber authorized the procedure and was subsequently informed that the transmission clutches, seals, gaskets and torque convertor were damaged and needed to be replaced at a price of $771. Treber paid the repair bill and was given the defective parts allegedly removed from the Monte Carlo.

Following American Transmission's repair of the allegedly damaged transmission, the car was returned to

Hatt for inspection. Hatt disassembled the transmission and discovered that American Transmission had used inferior parts to replace parts Hatt installed in the vehicle. Some of the parts returned to Treber did not conform to the vehicle's transmission.

Rich Morris, a former employee of American Transmission, testified that it was not American transmission's policy to sell every customer a rebuilt engine. Donald Wilkinson, also a former employee of American Transmission, testified that he never saw defendant Jay Enterprises commit a fraudulent act or instruct anyone to commit fraud.

Although the evidence was sufficient to find that false representations were made to Treber by Rutherford regarding the condition of her transmission, the evidence was not sufficient to support a finding that the corporate defendant had a policy to defraud customers.

A corporation may be criminally liable for the fraudulent conduct of "its president and other agents, undertaken within the scope of their authority." *People* v *American Medical Centers*, 118 Mich App 135, 151; 324 NW2d 782 (1982), lv den 417 Mich 985, cert den sub nom *Fuentes* v *Michigan*, 464 US 1009; 104 S Ct 529; 78 L Ed 2d 711 (1983). In the instant case, Rutherford was a salesman for American Transmission. The prosecution introduced no evidence of the authority of Rutherford to bind the corporation. To the contrary, the evidence established that defendant Jay Enterprises did not have any policy which was designed to defraud customers. Rutherford was not acting within the scope of his authority when recommending the replacement of non-defective transmissions. Additionally, the prosecution failed to present direct or circumstantial evidence relating to the fraudulent conduct of the corporation. Thus, we do not find a sufficient basis upon which to hold Jay Enterprises criminally responsible for Rutherford's

conduct. Accordingly, the case against defendant is dismissed. A new trial may not be granted where, as here, reversal is predicated on the sufficiency of the evidence. The double jeopardy clause of the Fifth Amendment, applicable to the states by virtue of the Fourteenth Amendment, precludes any remedy other than dismissal of the prosecution. *Burks* v *United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978); *People* v *Jasman*, 92 Mich App 81, 87; 284 NW2d 496 (1979).

In light of our decision that the evidence was insufficient to support defendant Jay Enterprises' conviction, we need not address the remainder of defendant's arguments.

Reversed and dismissed.

/s/ Robert J. Danhof
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald